

**SOUTH AFRICA AWAITS A POSSIBLE NEW LAW BANNING
FOREIGN OWNERSHIP AND RESTRICTING DOMESTIC
OWNERSHIP OF AGRICULTURAL LAND: IS THIS IN LINE
WITH THIS COUNTRY'S OBLIGATIONS AND
COMMITMENTS UNDER THE GATS AND ITS BITS?**

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Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the LLM in International Trade Law in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a program of courses.

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ABSTRACT

The South African Government publicly announced its intention to table the Regulation of Land Holdings Bill in Parliament soon, as part of their land reform priority. This potential new law aims to prohibit foreign ownership of agricultural land and to place ceilings on the size of agricultural land that citizens and foreigners may own. Foreigners will be allowed to conclude long term leases. Some parties most likely to be affected by this proposed new Bill are South Africa's fellow WTO Members in services trade and investors from its BIT partner countries. As a WTO Member and BIT partner, SA undertook various contractual obligations and commitments.

The primary objective of this study is therefore to determine whether, by promulgating the proposed Bill, South Africa might be violating any of these obligations or commitments. This is done by considering firstly the policy and constitutional background of the Bill in light of the General and Specific GATS commitments such as the MFN, Transparency, National Treatment and Market Access Commitments. The outcome of this analysis shows that South Africa may violate its National Treatment and Market Access Specific Commitments by imposing the ban on foreign ownership of agricultural land. This is because those foreign services providers intending to own (as opposed to leasing) agricultural land to establish commercial presence in South Africa, will be prohibited from doing so - despite South Africa's GATS Schedule of Specific Commitments not indicating any such land ownership restrictions either horizontally or sector-specifically. Examples of affected service sectors are the Tourism, Manufacturing and Construction sectors. It is then concluded that (i) South Africa could potentially raise the public order General Exception against any possible violation claims; but (ii) that South Africa should in the alternative, rather consider modifying or withdrawing some of its GATS Commitments. The protections which South Africa's BITs provide are then analysed in light of what is publicly known about the proposed Bill. It is concluded, for example, that the restriction of the property rights of existing foreign owners of agricultural land in South Africa by restricting their rights to dispose of their land to South Africans only – may constitute indirect expropriation for which they should be compensated in terms of relevant BITs. Although the country's investment policy *vis a vis* BIT has changed leading to the termination of, for example, some European-South African BITs, these agreements all contain sunset clauses opening up the country for potential investor-state arbitration claims for up to 20 years. The thesis concludes with the recommendation that South Africa carefully considers the implications of potential claims from its WTO and BIT partners and in also, other alternative land reform options.

ABBREVIATIONS

BEE	Black Economic Empowerment
BIT	Bilateral Investment Treaty
DSB	Dispute Settlement Body
DSU	Dispute Settlement Undertaking
DTI	Department of Trade and Industry
FOAL	Foreign ownership of agricultural land
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreements
MFN	Most Favoured Nation Principle
RLHB	Regulation of Land Holdings Bill
PIA	Protection of Investments Act 22 of 2015
SA	South Africa
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organisation

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INTRODUCTION

On its re-entry into world trade in 1994 with the demise of Apartheid, South Africa as an original member of the World Trade Organisation (the ‘WTO’) and as a new democracy, undertook significant international trade and investment commitments as, *inter alia*, a multilateral and bilateral contracting party in the global economy. Needless to say, these external commitments were only the metaphorical tip of the iceberg for South Africa as its newly elected Government (the ‘Government’) naturally had the main aim of eradicating the effects of Apartheid domestically. Today, still as a developing country facing tough economic and political challenges mostly initiated by the prowling effects of its colonial and economically divided past, the country’s legal policies and laws, amongst others, tell tales of a society where the eradication of cultural division is still a serious political and legal priority.

One such policy and potential law relating to Government’s land reform goals, was revealed recently when the current President of South Africa, Jacob Zuma, in the 2015 annual State of the Nation Address¹ and reiterated in his Address on 11 February 2016,² (the ‘Address’), announced that the Government plans to introduce the proposed Regulation of Land Holdings Bill (the ‘RLHB’ or the ‘Bill’). The effect of the RLHB on proclamation will, *inter alia*, be the prohibition of foreign acquisition of *agricultural land* and the introduction of land ceilings for South Africans and existing foreign owners of agricultural land.³ According to the President, the restriction of foreign acquisition of agricultural land will be ‘fair’ as foreigners will still be

¹ President Jacob Zuma: ‘State of the Nation Address’ (2015) available here: <http://www.gov.za/president-jacob-zuma-state-nation-address-2015>, accessed on 17 February 2017.

² Press Statement by the Parliament of South Africa; ‘President Jacob Zuma: Response to Debate on the State of the Nation Address’, dated 18 February 2016; available at: http://www.parliament.gov.za/live/content.php?Item_ID=8705&Revision=en/82&SearchStart=0, accessed on 17 February 2017.

³ Ibid, note 2.

allowed to conclude long term leases in respect thereof.⁴ The President stated further, in relation to land acquired by foreigners in South Africa,⁵ that:

“To buy ... [land] and make it your property when a good percentage of South African cities have no land... is very difficult to justify when people... don’t own land and part of our country is being owned by people out there.”

The Government has maintained that the Bill is following the example of many other countries⁶ who have implemented similar laws or are considering doing so.⁷ The purpose of this Bill, when enacted, will be for land reform.⁸ To date, however, the Bill has not yet been introduced for comment and it is uncertain when this can be expected – albeit being reported by Parliament that it would have been released during 2016.⁹ In the meantime it appears, that South Africa’s direct next-door neighbour, Namibia, has overtaken South Africa by very recently publishing a bill aiming to prohibit foreign ownership of agricultural land (‘FOAL’) as well. This is referred to briefly for purposes of possible contextualisation. Although the concept of prohibition of foreign ownership seems like a foreign concept for the ‘new’ South Africa, a deeper look into this concept has shown that this worldwide phenomenon is in existence for long as countries have always feared ‘foreign take-over’.¹⁰

As my research will indicate, the proposed Bill has had a longer history than apparent as Government has investigated the notion of regulating foreign ownership of land for years for

⁴ South African Government News Agency, “Proposal to stop foreign land ownership ‘fair’: President” Available at: <http://www.sanews.gov.za/south-africa/proposal-stop-foreign-land-ownership-%e2%80%98fair%e2%80%99-president>, accessed on 17 December 2016.

⁵ Brand South Africa, ‘South Africa’s land ownership proposals ‘are fair’” (2015) available at: <https://www.brandsouthafrica.com/south-africa-fast-facts/news-facts/land-ownership-160215>.

⁶ Such as ‘Australia, Thailand, Cambodia, the Philippines, Kenya, Ghana and certain South American countries’.

⁷ South African Government News Agency, ‘Land Holdings Bill to be presented to Parliament’, 11 February 2016, available at: <http://www.sanews.gov.za/south-africa/land-holdings-bill-be-presented-cabinet>, accessed on 17 December 2016.

⁸ President Jacob Zuma, ‘State of the Nation Address 2016’ available here: <http://www.gov.za/speeches/president-jacob-zuma-state-nation-address-2016-11-feb-2016-0000> accessed 17 December 2016.

⁹ Press Statement by the Parliament of South Africa; President Jacob Zuma: Response to Debate on the State of the Nation Address, dated 18 February 2016; available at: http://www.parliament.gov.za/live/content.php?Item_ID=8705&Revision=en/82&SearchStart=0.

¹⁰ For a study into this concept, please see: Stephen Hodgson, Cormac Cullinan and Karen Campbell, ‘Land Ownership And Foreigners: A Comparative Analysis of Regulatory Approaches to the Acquisition and use of Land by Foreigners’ (1999), FAO Legal Papers Online #6, available at: http://www.fao.org/fileadmin/user_upload/legal/docs/lpo6.pdf, Page 21, accessed on 19 January 2017.

purposes of land redistribution.¹¹ Recent academic reporting, however, concluded that there is no clear correlation between foreign property ownership and local redistribution of land despite the ‘hype’¹² which seems to exist.

Whilst many foreigners might be anxiously awaiting the reveal of the RLHB’s content, this thesis aims to analyse in the context of International Trade Law, the possible legal consequences of the RLHB on international trade in services and investment with South Africa. This is because the parties perhaps most interested in the outcome of the Bill internationally will be South Africa’s contracting partners, for example, under the WTO’s General Agreement on Trade and Services (the ‘GATS’) and its various Bilateral Investment Treaty (‘BIT’) partners. Hereby the country undertook considerable trade and investment supportive contractual commitments and obligations. Current Government policy acknowledge the ‘*complementary relationship*’ between trade and investment and that investment and trade can act as a mutual stimulus.¹³

This study of some international commitments and obligations of South Africa will show that South Africa opened its doors wide to international trade and investment when entering its democratic political dispensation, striving for inclusion in world trade after years of economic isolation.¹⁴ In doing so, it seems that the country might have overplayed its hand in the International Law context by giving up too much of its sovereign power to make domestic laws aimed at rectifying the wrongs of the past. For instance, the thesis indicates why South Africa might be violating its Market Access and National Treatment specific commitments under the GATS and why it might be vulnerable to possible compensation in respect of indirect expropriation claims by investors from its BIT partner countries.

¹¹ Amanda Swanson, ‘The Effect of Foreign Property Ownership in South Africa on Local Land Redistribution’ submitted to the University of Cape Town with Prof Hanri Mostert (2011), available at: <http://landlawwatch.co.za/download/2011/LLP/LLP-2011-Swanson-Foreign%20Ownership.pdf>, at pages 20-21.

¹² Amanda Swanson, ‘The Effect of Foreign Property Ownership in South Africa on Local Land Redistribution’ submitted to the University of Cape Town with Prof Hanri Mostert (2011), <http://landlawwatch.co.za/download/2011/LLP/LLP-2011-Swanson-Foreign%20Ownership.pdf>, at page 21.

¹³ Xolelwa Mlumbi-Peter, ‘South Africa’s Trade and Investment Policy, a Presentation to the Parliamentary Portfolio Committee’, (2015) available at: https://www.thedti.gov.za/parliament/2015/SA_Trade_Investment_Policy.pdf, at Page 21, accessed on 12 January 2017.

¹⁴ Ibid note 13 - For example, it has been said by the DTI itself that SA’s services sectors are very open as its WTO Services commitments actually exceed some OECD countries.

While the thesis indicates the importance of countries, like South Africa, regaining their law-making abilities in relation to their vital domestic socio-economic goals, it also tries to showcase the limitations and potential international legal liability faced by South Africa when attempting to implement laws like the RLHB.

Whilst the possibility of this Bill has been both welcomed and criticised¹⁵ in South Africa based on its probable impact on the Government's policies relating to land reform and due to the economic effect on foreign direct investment in South Africa – a few important questions remain from an International Trade Law perspective.

With the ultimate purpose of determining if South Africa may be held accountable to its international trading partners based on existing contractual obligations and commitments, these questions are as follows:

- (i) **Chapter 1:** What is the RLHB's content, purpose, policy and constitutional origin?
- (ii) **Chapter 1:** What are some of the possible economic impacts the RLHB will have?
- (iii) **Chapter 2:** Will the promulgation of the RLHB be in compliance with South Africa's most favoured nation obligations, its specific '*market access*' and '*national treatment*' commitments under the GATS, and are any general exceptions applicable? and
- (iv) **Chapter 3:** Will the promulgation of the RLHB violate any of South Africa's treaty obligations under its BITs, and what is South Africa's current position on BITs?

¹⁵ Examples: SA Commercial Prop News, 'SA Property Owners upset with ban on Foreign Land (note line spacing) Ownership in South Africa' (2015), available at: <http://www.sacommercialpropnews.co.za/business-specialties/legal-and-policy/7129-sa-property-owners-upset-with-ban-of-foreign-land-ownership-in-sa.html>; Bowman & Gilfillan, 'The regulation of foreign land ownership in South Africa', (2015) available at: <http://polity.org.za/article/the-regulation-of-foreign-land-ownership-in-south-africa-2015-03-17>.

CHAPTER 1

The Proposed Regulation of Land Holdings Bill: its Content, Purpose, Policy & Constitutional Background and Economic Effects

An investigation into the lawfulness of the RLHB under International Trade Law requires a better understanding of its probable content, purpose, policy and Constitutional background. This Chapter therefore seeks to engage with the Government's motives for earmarking the RLHB. Furthermore, it will also deal with some of the possible practical and economic outcomes of the prohibition of FOAL in South Africa.

1.1 The Content and Purpose of the Proposed Regulation of Land Holdings Bill

To date, the RLHB has not been submitted to Parliament. The only information currently available on this proposed Bill is therefore limited to statements made by the Government in the public domain and via official and other media reports.

So, for example, the President's most recent official announcement on the RLHB¹⁶ was during his State of the Nation Address in 2016¹⁷ when he stated the following:

'...Land reform remains an important factor as we pursue transformation. [...]

*I also announced the Regulation of Land Holdings Bill, which would **place a ceiling on land ownership at a maximum of 12 000 hectares and would prohibit foreign nationals from owning land....**' [Emphasis added.]*

¹⁶ The President did not make any mention of the proposed Bill during the State of the Nation Address on 9 February 2017, available at: <http://www.gov.za/speeches/president-jacob-zuma-2017-state-nation-address-9-feb-2017-0000>, accessed on 11 February 2017.

¹⁷ Ibid n1.

Following this, during a debate on the Address,¹⁸ he clarified the position as follows:

‘...The Regulation of Agricultural¹⁹ Land Holdings Bill will prohibit the acquisition of agricultural land by foreign nationals. They can only lease the land....’
[Emphasis added.]

Furthermore, ‘foreigners’ have been confirmed by the Presidency in February 2015 to include:

*‘foreign nationals and juristic persons [...] as well as juristic persons whose dominant shareholder or controller is a foreign controlled enterprise, entity or interest’.*²⁰

Additional information on the RLHB’s possible content and purpose has subsequently been shared by the President and the Minister of Rural Development and Land Reform, Gugile Nkwinti (the ‘**Minister**’), which include the following:

- (i) The RLHB will be enacted for land reform purposes;²¹
- (ii) Foreigners will still be allowed to acquire residential property;²²
- (iii) They will also be allowed to lease agricultural land for between 30 and 50 years;²³
- (iv) Recognition was given that the RLHB cannot apply ‘*retrospectively without constitutional infringements,*’ and therefore, foreigners with existing ‘*freehold*’ titles will not have their tenure altered by the promulgation of the RLHB;²⁴
- (v) In respect of existing foreign owners of agricultural land, a right of first refusal may apply in ‘*favour of another South African citizen in freehold or the state if the land is deemed strategic;*’²⁵

¹⁸ Ibid n2.

¹⁹ The word ‘*agricultural*’ was subsequently omitted from the name of the proposed Bill.

²⁰ The Presidency, ‘President Jacob Zuma on legislation to come before Parliament’, (2015) available at: <http://www.gov.za/sona-2015-legislation-come-parliament>, accessed on 16 December 2016.

²¹ President Jacob Zuma, ‘State of the Nation Address 2016’ available here: <http://www.gov.za/speeches/president-jacob-zuma-state-nation-address-2016-11-feb-2016-0000>.

²² Dianne Hawker, ‘Zuma: foreigners can own houses but not farms’, (2015), available at: <http://www.enca.com/south-africa/zuma-foreigners-can-own-houses-not-farms>, accessed on 8 March 2017.

²³ Budget Policy Speech: Minister G E Nkwinti (Mp) ‘Budget Vote 39: Department Of Rural Development and Land Reform’ (2015), available here: <http://www.dla.gov.za/speeches/category/333-2015>, P5-7, accessed 28 February 2017.

²⁴ SA Government News Agency, Land Holdings Bill to be presented to Cabinet, (2016) available at: <http://www.sanews.gov.za/south-africa/land-holdings-bill-be-presented-cabinet> accessed on 17 December 2016.

²⁵ SA Government News Agency, ‘New legislations to come before Parliament,’ (2015) available at, <http://www.sanews.gov.za/south-africa/new-legislations-come-parliament>, accessed on 4 March 2017.

- (vi) South African individuals and entities as well as existing foreign owners of agricultural land will not be allowed to own land in excess of 12 000 hectares and this may entail the following:²⁶
 - a. Land in excess of this possible ceiling, will be '*expropriated and redistributed.*' The compensation for such expropriation should be based on the '*just and equitable*' principle provided for in Section 25(3) of the South African Constitution.²⁷
 - b. The ceilings may possibly apply only to '*forestry, game farms and renewable energy farms, especially wind energy;*'²⁸ and
 - c. The ceilings might involve different maximum extents depending on the scale of farming;²⁹
- (vii) Foreign ownership of certain forms of land such as, '*environmentally and security sensitive lands as well as those that are of historic and cultural significance, and strategic lands (for land reform and socio-economic development)*' will be discouraged;³⁰ and
- (viii) The RLHB will establish a process of '*compulsory land holdings disclosures*' in respect of '*race, nationality, gender, extent of land owned and its use*' managed by a Land Commission.³¹

Despite the above listed indications of some practical outcomes of the RLHB's enactment, other critical practical considerations pertaining to **existing** foreign owners of agricultural land remain, in the author's view, unclarified. These considerations are amongst the topics relevant to the lawfulness discussion in the next Chapters and include, for example:

²⁶ Bowman Gilfillan, 'The regulation of foreign land ownership in South Africa' (2015) available at: <http://polity.org.za/article/the-regulation-of-foreign-land-ownership-in-south-africa-2015-03-17>, accessed on 21 January 2017.

²⁷ Ibid n23.

²⁸ Ibid n23.

²⁹ Ibid n23.

³⁰ Ibid n25.

³¹ Ibid n25.

- (i) Whether and in what way the RLHB will deal with the effects of restricting the marketing, selling and transfer of foreign agricultural land to South Africans *only*. In itself this restriction, in the author's view, constitutes a major impact of the proposed RLHB which affects, for example:
 - a. From the viewpoint of such foreign owners, the current market prices of their properties - which in some instances resulted from large capital and other investments - may not be attainable on the open South African property market where the Rand currency is weaker than currencies in the developed world; and
 - b. The RLHB may therefore be seen as restricting the ability of foreign sellers to sell their property which, in turn, will probably reduce the prices at which they wish to sell.
- (ii) There exists a concern amongst farm owners that the potential land ceilings will negatively impact on the economic viability of their farming operations which will, in turn affect competitiveness;³²
- (iii) The extent of the possible restriction of the transfer of immovable property via the law of succession by existing foreign agricultural land owners to their foreign heirs, is unclear.
 - a. Here it is interesting to note that this issue is dealt with in the draft Namibian Land Bill, which aims to prohibit FOAL for the similar purpose as the RLHB.³³ Clause 115(1)(a) thereof exempts from the prohibition of FOAL intestacy and testamentary dispositions if a foreign heir or legatee originally resides or does business in Namibia.
 - b. If an heir or legatee does not ordinarily reside in Namibia (presuming they are foreigners), the Land Bill provides that the executor must offer to sell the land to

³² Ray Mahlaka, The Land Holdings Bill is impractical – industry players: Farm owners warn of competitiveness challenges, (2015) available at: <https://www.moneyweb.co.za/news/industry/industry-players-pan-land-holdings-bill-impractical/>; accessed on 9 March 2017.

³³ Part 5 of Chapter 4 to the newly published Namibian Land Bill outright prohibits the acquisition of agricultural land by foreign nationals by either a transfer of ownership in the deeds registry, or via the direct or indirect acquisition of majority interest in a company or close corporation owning agricultural land. The purpose of the Land Bill is also for land reform in order to rectify the injustices of the past. (Clause 3)

the state which has a preferential right to purchase any agricultural land to be alienated by any owner.³⁴

- (iv) The restriction of the transfer of agricultural land to foreign spouses in the event of divorce or death is unclear.
 - a. This issue is also addressed in the Namibian Land Bill where Clause 115(1)(b) explicitly exempts from the prohibition to own agricultural land, transfers between spouses where the one is a foreigner and resides in Namibia.
 - b. Here the Land Bill, however, only deals with marriages in community of property where the spouses in any event usually own the land in undivided equal shares. The question therefore is what would happen in the event of the spouses being married out of community of property where the one spouse is a foreigner and becomes entitled to the other half undivided share of the Namibian spouse in terms of the divorce order. The same question arises in the event of death of the Namibian spouse.
 - c. Surely, in this instance, it would be gravely unfair to hold that divorced or surviving foreign spouses married out of community of property could not acquire agricultural land in terms of a divorce order or a will;
- (v) The impact on foreign financial services providers such as commercial banks and other financial service providers that have registered mortgage bonds as mortgagees over South African foreign owned agricultural property is unclear. In the event of default on the part of the mortgagors under such bonds, the question might be if foreign mortgagees can foreclose on the property and sell it in execution; and
- (vi) It is unclear what the position will be in respect of the rights of those foreigners who have concluded option to purchase agreements or are entitled to rights of first refusals in existing sale or lease agreements concluded in respect of agricultural land.

³⁴ Clauses 115(1)(a) & 78(4), Land Bill.

From the above, one can conclude that while the RLHB is not submitted to Parliament, some of its essential content and impacts on existing and future foreign owners of agricultural land is unknown or unclear. We turn next to the policy and Constitutional background of the RLHB insofar as it lays down the potential national policy arguments for the RLHB.

1.2 The Policy and Constitutional Background

a) The Policy Background:

Despite the abovementioned uncertainties of what the RLHB will contain, what is clear in respect of the purpose of the RLHB, is that the promulgation of this Bill forms part of Government's current '*radical*' position *vis a vis* land reform.³⁵ Government has increasingly been subject public pressure³⁶ due to the slow pace of existing land reform programs.³⁷ Reasons for this slow pace and other policy grounds relating to the prohibition of FOAL, are what will be discussed next.

My search for a dedicated and comprehensive policy on foreign ownership of agricultural land in South Africa led to various reports and policies affecting land reform. Four of these are significant for purposes of this thesis and will be mentioned briefly below, including: the White Paper on South African Land Policy, 1997 (the '**White Paper**');³⁸ the Report and Recommendations by the Panel of Experts on the Development of Policy regarding Land Ownership by Foreigners in South Africa' (the '**Panel Report**');³⁹ the Green Paper on Land

³⁵ Deneo Bendile, 'ANC plans 'constitutional revolution' on land' (2017) available at: <https://mg.co.za/article/2017-02-03-00-anc-hits-warp-speed-on-land/>, accessed on 28 February 2017.

³⁶ Ibid n35. For example, in a recent interview of the Minister of Small Business and Development, Lindiwe Zulu, she said that the ANC government could no longer be "*held to ransom by investors at the expense of citizens' needs*." She was also quoted in saying that: "*The bottom line is that we are in trouble. We need to fast-track the decisions we took.*"

³⁷ Ibid n35.

³⁸ Available at: <http://www.ruraldevelopment.gov.za/phocadownload/White-Papers/whitepaperlandreform.pdf>, accessed on 28 February 2017.

³⁹ Department of Land Affairs

'Report and Recommendations by the Panel of Experts on the Development of Policy regarding Land Ownership by Foreigners in South Africa', (2007) also published in Government Gazette 30239, Notice:

Reform (the ‘**Green Paper**’);⁴⁰ and more recently, the Agricultural Landholding Policy Framework (the ‘**Policy Framework**’).⁴¹

A significant early mention of the prohibition of foreign ownership of land, can be traced back to 2005 when, during the National Land Summit, it was suggested that a ‘*moratorium*’ be instituted on foreign land ownership in South Africa.⁴² Reasons given for this were the existence of strong public opinion and perception that ‘*unregulated ownership of ... land by foreigners ... contributed significantly to the lack of readily available and affordable land for land reform.*’⁴³ In addition, the concern was raised, that the land reform program as provided for in the White Paper, which included land restitution, tenure security and redistribution, should move ‘*at a faster pace*’.⁴⁴

These concerns sparked Government’s official discussion of regulating foreign ownership of land which culminated, for example, in the Department of Land Affairs in 2007 publishing the comprehensive Panel Report as mentioned above, for public comment. The Panel of Experts that compiled this Report investigated, based on available yet insufficient Deeds Office data, the nature and extent of foreign land ownership in South Africa.⁴⁵

The purpose of the Report was to design a policy framework on foreign ownership of land.⁴⁶ Foreign ownership was considered an ‘*intervening factor*’ of which the impact on ownership patterns in South Africa, and especially on land reform, was unknown.⁴⁷ Various countries were visited such as Brazil, Indonesia, Singapore and England to analyse their laws in

1081 of 2007, available at: http://www.ruraldevelopment.gov.za/phocadownload/Foreign-land-owners/PLOF_Report.pdf, accessed on 17 November 2016.

⁴⁰ As published in Government Gazette No. 34607, Notice 639 of 2011, dated 16 September 2011, Page 3, available at: http://www.gov.za/sites/www.gov.za/files/34607_gen639_0.pdf, accessed on 19 December 2016.

⁴¹ Available at: <http://www.ruraldevelopment.gov.za/legislation-and-policies/file/2052-agricultural-landing-policy-framework>, accessed on 4 March 2017.

⁴² Ibid n39, P5.

⁴³ SA Government News Room, ‘Land Affairs on development of Policy on Regulation of Ownership of Land in SA by Foreigners’, (2006), available at: <http://www.gov.za/land-affairs-development-policy-regulation-ownership-land-sa-foreigners>, accessed on 2 March 2017.

⁴⁴ Ibid n43.

⁴⁵ Ibid n39, P3. The Expert Panel was chaired by Prof. Shadrack Gutto, of the Centre for African Renaissance Studies at UNISA.

⁴⁶ Ibid n39, P5.

⁴⁷ Ibid n39, P5.

determining how they still managed to attract FDI despite regulating foreign land ownership.⁴⁸ It was concluded that policies regulating foreign ownership were worldwide norms also for some countries with comparable levels of economic development.⁴⁹

The Panel Report encapsulates findings from a public participation process which distinguished between pro-and-contra arguments.⁵⁰ The Panel emphasised that both black and white ordinary South African citizens submitting commentary for their Report: *'feel very strongly that acquisition of prime land by foreigners is denying them affordable access to land and rendering them strangers in their own country'*.⁵¹

A review of the arguments in favour of the regulation of foreign land ownership shows that the Recent Policy grounds mentioned by the President have been underpinning the drive toward the proposed RLHB for more than a decade.

Some of the pro-regulation grounds in the Report, include that: (i) the *'willing-buyer, willing-seller'* principle as laid down by Government for land redistribution, may encourage the *'free market'* for land but not *'necessarily land reform'*.⁵² This is, for example, because the Rand currency cannot compete on the open market and *'prime agricultural land'* is therefore acquired by foreigners;⁵³ (ii) *'unregulated property developments'*, often entail the relocation of communities into towns and negatively affect established communities on rural land and established livelihoods dependent on subsistence farming;⁵⁴ (iii) property developments (e.g. golf estates) restrict entry to coastal regions where inhabitants rely on fishing and fire-wood;⁵⁵ (iv) new developments entail different skillsets and therefore, farmworkers are rarely *'re-employed'*;⁵⁶ (vi) violent conflicts have erupted over the conversion of agricultural land into

⁴⁸ Ibid n39, P7.

⁴⁹ Ibid n39, P8.

⁵⁰ Ibid n39, P12-15.

⁵¹ Ibid n39, P8.

⁵² Ibid n39, P13.

⁵³ Ibid n39, P13.

⁵⁴ Ibid n39, P13.

⁵⁵ Ibid n39, P13.

⁵⁶ Ibid n39, P13.

game farms;⁵⁷ (vii) game farms, lodges and golf estates erected on '*high potential agricultural land*' may create less job opportunities than commercial farming.⁵⁸ This also leads to land speculation; and (viii) game farming attracts more skilled as opposed to uneducated labour than commercial farming.⁵⁹

The Panel concluded, based on available statistics, that individual foreigners mainly acquire residential urban land and not agricultural land in South Africa.⁶⁰ However, it appears that the owners of the majority of high valued farms in the '*prime market*' with '*high speculative value*' such as wine farms, are corporates.⁶¹ Due to shortcomings of the Deeds Registry System, the Panel had to rely on '*anecdotal evidence*' from estate agents and banks to establish that '*foreign corporate ownership is substantial*' in respect of land.⁶² Nevertheless, the Panel also found that corporate ownership of wine farms in the Western Cape were '*high in value but much lower in size*'.⁶³ The amount of foreign owned wine farms, however, was said to be increasing.

Examples given of foreign corporate owners of wine farms involving substantial capital investment in South Africa included: the French family-owned Morgenhof Wine Estate in Stellenbosch and the Swiss-owned Dornier Wine Estate, to name a few.⁶⁴ Furthermore, the Panel concluded that foreigners own approximately 3% of land in South Africa,⁶⁵ including: residential, agricultural and sectional title property, and that this percentage would be higher once more data became available on completion of their investigation into corporate ownership.⁶⁶

⁵⁷ Ibid n39, P13.

⁵⁸ Ibid n39, P13.

⁵⁹ Ibid n39, P13.

⁶⁰ Ibid n39, P22.

⁶¹ Ibid n39, P23.

⁶² Ibid n39, P23.

⁶³ Ibid n39, P21.

⁶⁴ Ibid n39, P23.

⁶⁵ Ibid n39, P7; Ibid n32. Please note that according to Government's latest reports this possible figure is still considered as below 5%.

⁶⁶ Ibid n39, P7.

Interestingly, the Panel's recommendations on regulating foreign ownership did not include the explicit prohibition of FOAL.⁶⁷ They do, however, bear striking resemblances to the possible provisions of the RLHB as mentioned in section 1.1. However, the following recommendations of the Panel seem to not be part of the proposed RLHB:⁶⁸ (i) the obtaining of special ministerial approval for the disposal of land to foreigners *or* citizens of certain types of land having the potential to negatively impact on land reform; (ii) an *outright prohibition*⁶⁹ of ownership by foreigners *or citizens* of land in certain areas based on national interest, environmental reasons, areas of historical and cultural significance, and for national security.⁷⁰ Examples of such areas included coastal areas, conservation areas, areas close to military installations, and along the borders; (ii) a '*Limited Temporary Moratorium*' of two years on the disposal of '*state land*' by any governmental sphere (including municipalities) to foreigners and certain citizens not eligible for redress under land reform policies;⁷¹ and (iii) medium to long term leases should be allowed of '*public land*' to provide a form of secure tenure for '*genuine foreign investors*'.

The above shows that most of the Panel's proposals on regulating land ownership were to affect not only foreigners, but South Africans as well. Furthermore, their proposal on the prohibition of foreign ownership of land seems restricted to state land and classified/protected areas. This might be due to: (i) the uncertainty on the actual extent of foreign ownership; and (ii) the contra-regulation arguments contained in the Report relating to the economic effects of such a prohibition, which will be discussed below.⁷²

Whilst no formal national policy on the regulation of foreign ownership of land has evolved from this Report, however, the idea of regulating foreign ownership has been taken up in the Green Paper mentioned above. The Green Paper deals with the topic of foreign ownership of land explicitly⁷³ although not explicitly in the context of the prohibition thereof. It seems to be

⁶⁷ Ibid n39, P37-40.

⁶⁸ Ibid n39, P3.

⁶⁹ Note that statements on the RLHB refer to such foreign ownership being '*discouraged*' not banned.

⁷⁰ Ibid n39, P41.

⁷¹ Ibid n39, P41.

⁷² In Section 19.

⁷³ Ibid n40, P8.

the first legislative development in relation to the regulation of foreign ownership, since Government published the Panel Report in 2007.

From the onset, the Green Paper links the land of South Africa to the principle of '*national sovereignty*' and to the notion that land is a '*national asset*'.⁷⁴ According to it, these principles are the fundamental start of achieving the objectives of effective land reform, food sovereignty and security.⁷⁵

In doing so, the Green Paper renewed Government's land reform vision and identified the challenges faced in respect of the existing land reform programs at the time of its publication. The problem statements relied on included a need to encourage '*national identity, shared citizenship and autonomy-fostering service delivery*'⁷⁶ by way of Government's continued investment in the transformation of systems and patterns of land control and ownership.

Furthermore, the Green Paper identified the weaknesses of the land reform system leading to the introduction of the Green Paper at the time,⁷⁷ which are similar to the ones contained in the Panel Report.⁷⁸ Different to the Panel Report, however, the Green Paper also notes the following additional challenges, namely:⁷⁹ (i) meeting the 30% redistribution target by 2014; (ii) the diminishing contribution of agriculture to the GDP; and (iii) unrelenting increases in rural unemployment.

To overcome these challenges, the Green Paper sets out the ideal land reform position in South Africa⁸⁰ as one which encapsulates (i) '*a re-configured single, coherent four-tier system of land tenure*' ensuring reasonable access to land for the basic needs of black people; (ii) '*clearly defined property rights,*'; and (iii) **secured long-term land tenure for resident non-**

⁷⁴ Ibid n40, P3.

⁷⁵ Ibid n40, P1.

⁷⁶ Ibid n40, P4.

⁷⁷ Ibid n40, P5.

⁷⁸ The rest include: the willing-seller-willing-buyer model, concerns about the beneficiary selection and support system; land administration.

⁷⁹ Ibid n40, P5.

⁸⁰ Green Paper on Land Reform, 2011, P4.

citizens that partake in investments enhancing food sovereignty, livelihood and improved agro-industrial development.

It is in this regard that the foreign owners of land in South Africa becomes relevant because the ideal of a single four-tier tenure system, which includes the categories of land rights earmarked for land reform,⁸¹ includes *'land owned by foreigners: freehold, but precarious tenure, with obligations and conditions to comply with'*.⁸² The other forms of land tenure include (a) state and public land; (b) privately owned land: freehold, with limited extent; and (c) communally owned land.

From the above, it is clear that the Green Paper makes mention of two instances where land rights of foreigners/non-citizens are relevant. The first instance is as part of a new tenure system introduced, and the second instance is in respect of a *'secure form of long-term land tenure for resident non-citizens engaged in appropriate investments.'* The Green Paper, however, does not provide any information on how these forms of foreign land tenure rights will contribute to resolving the land reform challenges identified.⁸³ In fact, according to property law experts, there is disappointment in the way it addresses how the weaknesses identified will be overcome.⁸⁴

Furthermore, the full extent of how foreign land owners will be affected is unclear.⁸⁵ For example, it is unclear how the word *'freehold'* is used in relation to the rights foreigners will have in respect of land. It has been said that the term could be a different concept to *'ownership'* in the South African legal sense.⁸⁶ This may therefore either be the use of the wrong word or indicate that ownership will vest in the Government.⁸⁷ Furthermore, it appears per the Green Paper that foreign-owned land will be subject to conditions but these are also not clarified.⁸⁸

⁸¹ Ibid n80, P6.

⁸² Third tier.

⁸³ JM, Pienaar *Land Reform* (2014), P239, P243 – 244.

⁸⁴ Pienaar op cit, n83, P268 – 269.

⁸⁵ Pienaar op cit, n84, P268 – 269.

⁸⁶ Pienaar, n83, P244.

⁸⁷ Pienaar, n83, P245.

⁸⁸ Ibid n40, P6.

Finally, the Green Paper was followed by the publication of the Policy Framework as referred to earlier in this section. This document is a framework for policy on, for example: (i) the setting floor and ceiling levels for agricultural land holdings; and (ii) the disclosure of information on use rights in agricultural property.⁸⁹ Although the Framework does not deal explicitly with the rights of foreign land owners, it does confirm that it applies to the four-tier system of land tenure which affects foreigners.⁹⁰ Interestingly, the document provides that its focus is to identify a balanced approach between granting access to land to people from rural areas whilst maintaining the *‘positive perception – and reality – that South Africa is an investor-friendly country’*.⁹¹ This seems to re-affirm that Government’s land reform policies do take cognisance of the rights of foreign investors.

Based on the above, the foremost policy reason for the implementation of the RLHB seems to be because land reform, as a critical objective of the Government, needs to be radically expedited. For this, it seems that one of the actions identified to achieve this expedition is the prohibition of FOAL which drives up market prices of agricultural land required for redistribution.⁹² We turn now to the next key step which is to consider the RLHB’s Constitutional background.

b) The Constitutional Background

As a potential new law, the RLHB requires a Constitutional basis. This is because all laws not consistent with the Constitution of the Republic of South Africa (the **‘Constitution’**)⁹³ are invalid.⁹⁴

As a law addressing the land reform and more specifically, the redistribution goal of Government, the proposed RLHB must be in line with Section 25 of the Constitution (the

⁸⁹ Ibid n41, P10.

⁹⁰ Ibid n41, P8.

⁹¹ Ibid n41, P10.

⁹² SA Government News Agency, Land Holdings Bill to be presented to Cabinet, (2016) available at: <http://www.sanews.gov.za/south-africa/land-holdings-bill-be-presented-cabinet> accessed on 17 December 2016.

⁹³ Act No. 108 of 1996.

⁹⁴ S2, Constitution.

‘**property clause**’). The property clause aims to achieve a balance⁹⁵ between two goals, namely: (i) protecting existing private property rights against Government’s interference;⁹⁶ and (ii) providing Government with authority to effect its land reform goals in the public interest.⁹⁷ The reformative purpose of the property clause is said to embody, *inter alia*, the redistribution programme of Government in Section 25(5)⁹⁸ providing that:

‘the state must take reasonable legislative and other measures, within its available resources so as to foster conditions which enable citizens to gain access to land on an equitable basis....’

The wording of Section 25(5) may be interpreted to mean that Government ‘has a general duty’ to take reasonable legislative steps with its available resources to, on an equitable basis, ensure that citizens have access to land.⁹⁹ Hereby, the Constitution limits the right of access to land for reform purposes, only to citizens. However, this government obligation needs to be in balance with existing property rights,¹⁰⁰ and this should include those of foreigners. Existing property rights of foreigners are protected by, for example, Section 25(1) from being unlawfully deprived.¹⁰¹ Reading Section 25(5) together with Section 25(8) furthermore, makes it clear, however, that no part of Section 25 may ‘impede the state from taking legislative measures to achieve...land reform...to address the results of the past racial discrimination’ **provided** – ‘that any departure of this section is in line with ... s 36(1).’ It has been said that Section 36 of the Constitution aims to find a balance between individual and public interests.¹⁰² This indicates that foreign land owners may have recourse to the South African Constitutional Court in the event of being unlawfully deprived of their property rights. This discussion, however, falls outside the ambit of this thesis which focusses on lawfulness in the International Law context.

The possible economic effects of the promulgation of the RLHB will be considered next.

⁹⁵ Ibid n83, P182.

⁹⁶ Sections 25(1)-25(3).

⁹⁷ Sections 25(4)-25(9).

⁹⁸ Ibid n83, P183.

⁹⁹ Ibid n83, P183.

¹⁰⁰ Ibid n83, P185.

¹⁰¹ Chapter 2 of the Constitution applies to everyone, including foreigners.

¹⁰² Ibid n83, P186.

1.3 Possible Economic Consequences

In order to ultimately determine whether, and in what way, the enactment of the RLHB may lead to South Africa being held accountable by its GATS and BIT partners for the violation of its commitments and obligations, this section briefly focusses on the probable economic outcome of the RLHB.

In my view, it is to be expected that the promulgation of the RLHB may negatively impact on the South African economy. In fact, this was the main argument raised against the regulation of foreign ownership of land when Government first investigated the notion.¹⁰³ Some contra-arguments *vis a vis* the regulation of foreign ownership of land in the abovementioned Panel Report, were that:¹⁰⁴ (i) government interference in the free market for land would ‘discourage investor confidence’; (ii) it would violate South Africa BITs; (iii) FDI supports economic growth and leads to job creation and should not be discouraged; and (iv) the opportunity costs of using land for agricultural purposes dictate that it should be used for alternative purposes.

Today, the most prevalent criticism against the promulgation of the RLHB is still driven by the fear of it discouraging FDI into South Africa.¹⁰⁵ This was also recently confirmed by the Minister when he stated that the prohibition of FOAL was mainly ‘outright rejected’ by the major part of the agricultural sector and the Banking Association of South Africa on the basis of it deterring foreign investment impacting the entire economy.¹⁰⁶ However, to this the Minister responded that:

*‘...We **certainly do not agree with this view**. Our conviction is that any investor, whether foreign or national, wants policy certainty. Once they understand what the policy is, they adapt accordingly....’*¹⁰⁷

Nevertheless, the importance of FDI for the economy can be seen, for example, in the OECD’s 2014 Restrictiveness Index which hailed the country as one of the most open countries

¹⁰³ Ibid n39, P13-15.

¹⁰⁴ Ibid n39, P14.

¹⁰⁵ SA Commercial Property News, ‘Nedbank’s view on proposed bill to block land sales to foreigners’ (2014), available at: <http://www.sacommercialpropnews.co.za/property-investment/6913-nedbank-view-on-proposed-bill-to-block-land-sales-to-foreigners.html>, accessed on 21 November 2016.

¹⁰⁶ Ibid n23, P6.

¹⁰⁷ Ibid n23, P7.

for FDI worldwide and showed that South Africa's FDI made up 42% of its total GDP.¹⁰⁸ One reason given recently for South Africa's openness to FDI is because it does not have foreign ownership restrictions on property.¹⁰⁹ Furthermore, recently the Government has emphasised the pivotal role which attracting FDI in South Africa plays and the message is generally sent that South Africa is '*open for business*'.¹¹⁰ However, South Africa recently saw a decline in FDI flows based on UNCTAD's World Investment Report, and some economist have said, this can be attributed to the country's changed foreign investment policy and its uncertain land reform policy proposals.¹¹¹

A reduction in FDI has been the experience of other countries imposing foreign ownership restrictions such as Brazil where media reports have recently indicated concerns about FDI reduction as a result thereof.¹¹² Brazil¹¹³ in 2010 instituted '*an effective prohibition on selling land to foreign individuals and companies*'.¹¹⁴ The reasons given for why the prohibition should be uplifted relating to FDI were because:¹¹⁵ (i) such prohibition resulted in economic and legal challenges; (ii) experience showed that all agricultural areas stood to '*gain from easing the ban*' as entities refused to invest in land in which they had '*no legal rights*'; (iii) the agricultural ministry emphasised the need for attracting investments in the agribusiness; (iv) a '*bigger presence of foreign investors*' could lead to higher productivity; and (v) a need existed for the agricultural market to be as '*open*' as possible to foreign investors.

¹⁰⁸ SA Government, 'President Jacob Zuma on importance of Foreign Direct Investment' (2015), available at: <http://www.gov.za/speeches/south-africa-recognises-importance-foreign-direct-investment-president-zuma-11-nov-2015>, accessed on 30 January 2017.

¹⁰⁹ Export.gov, 'South Africa - Openness to and Restriction on Foreign Investment', (2016), available at: <https://www.export.gov/article?id=South-Africa-openness-to-foreign-investment>, accessed on 25 January 2017.

¹¹⁰ Rob Davies, 'SA economy still attractive for investment' (2016) <http://www.iol.co.za/capetimes/business/sa-economy-still-attractive-for-investment-2073613>, accessed on 10 March 2017.

¹¹¹ Lynnley Donnelly, SA takes foreign direct investment hit (2015) <https://mg.co.za/article/2015-06-25-sa-takes-foreign-direct-investment-hit>, accessed on 10 March 2017.

¹¹² Paraguassu Lisandra, "Brazil to lift limits on foreigners' owning of land" (2016): Available at: <http://www.reuters.com/article/us-brazil-privatization-franco-idUSKCN0YG2PG>, accessed on 31 January 2017.

¹¹³ Brazil incidentally was one of the countries that the Government visited as part of the compiling of the Panel Report on a policy for the regulation of foreign ownership of land.

¹¹⁴ Ibid n112.

¹¹⁵ Ibid n112.

Furthermore, it has been said that international trade and investment are ‘*complementary*’ in serving foreign markets.¹¹⁶ One way in which they complement each other is on a multilateral level under the GATS’ ‘*commercial presence*’ mode of supply in terms of which - FDI is seen as the required method for exporting various services.¹¹⁷ This mode of service supply will be discussed in Chapter 2 below but for purposes of this section, it must be understood that FDI directly impacts on many foreign services suppliers requiring a physical presence in South Africa, which they achieve by acquiring their own property or assets. Consequently, a reduction in FDI relating to foreign services providers will probably affect trade in services involving agricultural land. It is the author’s view that the significance of such a reduction in services will, however, depend on the actual foreign investment in agricultural land by foreign services suppliers. The importance of trade in services can also be seen in the OECD’s report as mentioned above for 2016. It appears that services account for 14% of the GDP at the moment, whilst it accounts for 47% of the country’s ‘*exports in value added terms*’ which shows that the country’s goods exported depend heavily on services inputs.¹¹⁸

Precise statistics on foreign ownership of land is not available in South Africa, because the Deeds Registry system in South Africa does not make provision for the recording of sufficient data.¹¹⁹ As seen above, Government reports over the years, have indicated, however, that approximately 3% of South African land is foreign owned.¹²⁰ Whether the RLHB is necessary for purposes of land reform remains to be seen as academic reports show it is not, because the significance of FOAL is not material.¹²¹

It is accordingly the author’s view that the Government needs to consciously balance the potential loss of trade and investment confidence which will negatively impact on the country’s economic growth due to the introduction of the RLHB - against the real benefits it will reap in

¹¹⁶ WTO website, ‘Trade and foreign direct investment’ (1996) available at: https://www.wto.org/english/news_e/pres96_e/pr057_e.htm, accessed on 25 January 2017.

¹¹⁷ Ibid.

¹¹⁸ OECD Services Trade Restrictiveness Index (STRI): South Africa, (2016), second page, available here: http://www.oecd.org/southafrica/STRI_ZAF.pdf, accessed on 26 January 2017.

¹¹⁹ The Panel of Experts on the Development of Policy regarding Land Ownership by Foreigners in South Africa, represented by the Minister of Agriculture and Land Affairs at the time, Hon. Lulu Xingwana, ‘Report and Recommendations’ (2007), available at: http://www.ruraldevelopment.gov.za/phocadownload/Foreign-land-owners/PLOF_Report.pdf, pages 20-27.

¹²⁰ Ibid note 11, Pages 20-21.

¹²¹ Ibid note 11, Pages 14-16; Pages 20-27.

terms of land reform laws involving the total ban on FOAL. In addition, the benefits of FDI in South Africa should not be underestimated as it has been said to support: job creation and local spending on goods and services.¹²²

We turn now to the potential legal effects of the RLHB in relation to trade and investment.

¹²² Masipa Tshepo, 'The Impact of Foreign Direct Investment on Economic Growth and Employment in South Africa: A Time Series Analysis', (2014), Mediterranean Journal of Social Sciences MCSER Publishing, Rome-Italy, Vol 5 No 25, P18, available at: <http://www.mcser.org/journal/index.php/mjss/article/view/5344/5157>, accessed on 5 February 2017.

CHAPTER 2

Will the promulgation of the RLHB be in Violation of South Africa's General Obligations and Special Commitments under the GATS?

As seen above, it seems the RLHB will aim to remedy, as part of South Africa's general legal reform agenda, the injustices of the past by preventing more land being owned by foreigners. The Bill is also to assist Government in reaching its land reform goals sooner as the country's land reform programme is still in a state of flux.

Considering that the RLHB will probably affect foreign direct investment, international trade in services and the operation of foreign services providers in South Africa,¹²³ this Chapter aims to investigate if the promulgation thereof may be in conflict with South Africa's GATS obligations and commitments. These obligations and commitments should, in the author's view, be considered because they directly affect the roles of WTO Members, such as South Africa, in regulating trade and investment in services.¹²⁴ GATS restricts, to a certain extent, the rights of the South African Government to make its own domestic policies and laws affecting foreign service sectors, as it does with the governments of all WTO Members.¹²⁵

It must be noted therefore that the RLHB might draw the attention of South Africa's service trading partners who already own land or who intend to own land in the country. The ideas shared in this thesis may be of interest to South Africa's legal profession when it is consulted to comment on the possible International Trade Law implications of the RLHB when it is tabled in Parliament for comment.

¹²³ Ibid n116.

¹²⁴ Annex 1B of the Marrakesh Agreement Establishing the WTO.

¹²⁵ Cottier et al, P2.

In what follows, the South African GATS commitments and obligations will be considered more closely to show why South Africa will probably contravene some of its commitments and obligations by promulgating the RLHB and what the possible consequences thereof will be.

2.1 The Relevance of the GATS for South Africa

As a WTO Agreement, the GATS was introduced during the Uruguay Round in the year 1995 as a multilateral agreement governing international trade in all services.¹²⁶

As an original WTO Member, South Africa, like all other 162 members, automatically became bound by and assumed general obligations and specific commitments under the GATS in individual service sectors due to the '*single undertaking rule*'.¹²⁷ The latter rule implies that South Africa could not elect whether or not it wanted to sign-up to the GATS.¹²⁸ Similar to its counterpart for trade in goods, namely the General Agreement on Tariffs and Trade ('GATT'), the GATS aims to ensure, in relation to international trade in services, the promotion of:¹²⁹ (i) a system of dependable international trade rules; (ii) non-discrimination, fair and equitable treatment of all participants; (iii) economic activity through guaranteed policy bindings; and (iv) trade and development through progressive liberalisation.

In order to achieve this all Members had to, apart from general obligations as contained in the GATS' text, also bound itself to a set of variable specific commitments in respect of the specific services sectors which they committed to international trade, and South Africa was no exception.¹³⁰ South Africa's specific commitments are contained in its Schedules of Commitments and, with the exclusion of a few service sectors, South Africa committed to fully

¹²⁶ GATS Preamble, second sentence.

¹²⁷ WTO website, 'The General Agreement on Trade in Services (GATS): objectives, coverage and disciplines' available at: https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm, accessed on 01 December 2016.

¹²⁸ WTO Website, 'How the negotiations are organized' available at: https://www.wto.org/english/tratop_e/dda_e/work_organ_e.htm, accessed 21 January 2017.

¹²⁹ Ibid note 127.

¹³⁰ Ibid note 18 and as per South Africa's trade profile on the WTO website, '*South Africa and the WTO*' available at: https://www.wto.org/english/thewto_e/countries_e/south_africa_e.htm, accessed on 1 December 2016.

opening its markets to international trade in most services.¹³¹ These commitments will be looked at more closely in relation to the RLHB below when analysing if South Africa will be in violation of any of them by implementing the RLHB.

The commitments, however, should be understood in light of the purpose of the GATS¹³² and the reasons why South Africa is a contracting state to the GATS. The Agreement aims to grow international commerce and promote '*progressive liberalization*' of trade in services to promote economic growth for all trading partners and for the development of developing countries.¹³³ At the same time, the Agreement nevertheless, recognises Members' rights to introduce new domestic regulations affecting the supply of services to meet national policy objectives, and especially the need for developing countries to do so.¹³⁴

By opening up most of its services sectors to international trade for the promotion of economic growth, South Africa has therefore bound most of its services sectors to general and specific GATS commitments and obligations. Accordingly, if the country wishes to introduce new domestic laws affecting trade in services, such as the RLHB, the laws must be in line with these commitments and obligations. Alternatively, South Africa will have to show that such laws are introduced for national policy purposes.¹³⁵

Based on the Preamble of the GATS there seems to be tension between the purpose of the GATS, which is the desire to provide a framework of rules preventing trade protectionism and the recognition that developing countries should still be allowed to regulate the supply of services in their quest to meet national policy objectives. This tension will be amongst the themes to be discussed towards the end of this Chapter in relation to the GATS' general exceptions.

I commence the investigation if South Africa will comply with its GATS General Obligations and Specific Commitments, by determining if the RLHB falls within the ambit of the

¹³¹ GATS Preamble.

¹³² As set out in the GATS Preamble.

¹³³ Ibid n131.

¹³⁴ Ibid n127.

¹³⁵ GATS Preamble.

GATS. This is because any measure affecting services trade implemented by a WTO Member may only be challenged by another WTO Member before the Dispute Settlement Body of the WTO (the ‘DSB’) if the GATS applies to it.¹³⁶

It is the author’s view that the GATS is applicable to the RLHB, based on the following analysis:

The scope of the GATS

Article I:1 of the GATS provides that this Agreement applies to (i) ‘*measures by Members*’ affecting (ii) ‘*trade in services*’.¹³⁷ In terms of Article I:3 ‘*measures by Members*’ constitute those taken by any sphere of government and may even involve measures taken through delegated authority.¹³⁸

A ‘*measure*’ is further defined in terms of Article XXVIII(a) as ‘*any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form.*’ This definition must be read with Article XXVIII(c), which limits the application of the GATS to those laws, regulations, etc., ‘*affecting trade in services*’.

Trade in services are defined as the supply of services (e.g. production, distribution, etc.)¹³⁹ through one of the following means:¹⁴⁰

- ‘ ...
- (i) ***the purchase, payment or use of a service;***
 - (ii) ***the access to and use of, in connection with the supply of a service, services which are required by those Members to be offered to the public generally;***
 - (iii) ***the presence, including commercial presence, of persons of a Member for the supply of a service in the territory of another Member;*** [Emphasis added.]

Accordingly, in order for the RLHB to qualify as a measure for GATS purposes, it must affect the supply of services delivered through one of the ways as set out in the quoted definition of measures ‘*affecting trade in services*’ above.¹⁴¹

¹³⁶ Matsushita et al, 3rd Ed, P560.

¹³⁷ Ibid n136.

¹³⁸ Article I:3, GATS.

¹³⁹ Article XXVII(b), GATS.

¹⁴⁰ Article XXVIII(c); For a discussion see Ibid n136, P564-565.

The question therefore is whether the prohibition of FOAL will affect foreign services providers' abilities to provide their services in South Africa through one of the abovementioned ways.

What *affects* trade in services has been interpreted broadly in the past by the Appellate Body (the 'AB'). In the *EC-Bananas III* case, for instance,¹⁴² the AB had to decide, if new licence rules for the importation of bananas violated the Most Favoured Nation principle in terms of the GATS, as it treated some service suppliers more favourably than others. The AB found that the import licences constituted '*measures*' under the GATS because it affected services trade. The reason given was because the "*ordinary meaning of the word 'affecting'*" in Article I:1 must be interpreted broadly to mean any measure that has '*an effect on*' trade in services.¹⁴³ The AB also confirmed that '*services*' in Article I:1 should be interpreted broadly in terms of the definition of services under Article I:3(b) which refers to '*any*' service in '*any*' sector except services supplied in the exercise of governmental authority.¹⁴⁴ The latter services refer to all those services that are not supplied commercially or in competition with one or more service suppliers.¹⁴⁵

Accordingly, if it can be shown that the promulgation of the RLHB will in *any* way affect foreign services providers' capacity to supply their services in South Africa – this potential new law must comply with the GATS. It is the author's view that this is the case because it will prevent those WTO Members **mainly interested or reliant on owning agricultural land** - from establishing a commercial presence¹⁴⁶ in the territory of South Africa from where they can supply their services.¹⁴⁷

In addition, this broad interpretation of measures '*affecting*' services has been said to imply that if a measure changes the '*conditions of competition*'¹⁴⁸ between suppliers of services then it

¹⁴¹ Article XXVIII(c); For a discussion see Ibid n136, P564-565.

¹⁴² AB Report, *EC – Bananas III* case, Para.220.

¹⁴³ AB Report, *EC – Bananas III* case, Para.74.

¹⁴⁴ Article I:3(b) of the GATS.

¹⁴⁵ Article I:3(c) of the GATS.

¹⁴⁶ This concept will be looked at more closely below at s2.2.2. It includes: (i) '*the creation or maintenance of a branch or a representative office...*' in another's territory. Article XXVIII(d)(ii).

¹⁴⁷ Article XXVIII(c)(iii).

¹⁴⁸ *Panel Decision in EC – Bananas III* case, Para.7.281.

affects trade in services. In the context of the National Treatment commitments,¹⁴⁹ for example, it implies that if implementing the RLHB will affect the competition between service providers from different WTO Member countries operating in South Africa and South African service providers, the measure would fall under the ambit of the GATS. By allowing only nationals to forthwith acquire agricultural land, it can be argued that South African service providers operating from agricultural land are favoured over foreigners competing with them.

Based on this, the RLHB will constitute a measure for GATS purposes as it will affect those foreign services suppliers intending to establish a commercial presence here to supply their services on agricultural land. Whether this measure is lawful under the GATS, is what we turn to next.

2.2 The Lawfulness of the Proposed Regulation of Land Holdings Bill under the GATS

The GATS, which applies to trade in all services, is supported by three pillars consisting of (i) general obligations; (ii) annexes relating to sector specific rules; and (iii) schedules of commitments by WTO Members. These pillars will be looked at below when determining the lawfulness of the promulgation of the RLHB. In order to be lawful, the implementation of this potential new law may not contravene South Africa's GATS: (i) General Obligations; or (ii) Specific Commitments.

My study on the lawfulness of the RLHB under the GATS will, however, mainly focus on South Africa's Specific Commitments which, in my view, are likely to be contravened by the promulgation of the RLHB. Furthermore, I am of the view that the RLHB on promulgation may be in line with the country's general obligations as explained directly below.

¹⁴⁹ Ibid n127.

2.2.1 Promulgation of the RLHB is likely to comply with SA's Main General GATS Obligations

The general obligations under the GATS are those provisions which WTO Members have to take on and¹⁵⁰ respect in full.¹⁵¹ These obligations can be divided into unconditional and conditional obligations.¹⁵² Unconditional obligations are those which all Members have to abide by, regardless of the existence of specific commitments and include, for example, two vital obligations:¹⁵³ the Most Favoured Nation ('MFN') treatment principle (per Article II); and Basic Transparency (per Article III).

The reasons why the promulgation of the RLHB may be in line with these two obligations are the following:

(a) *In respect of the MFN Treatment Obligation:*

This general obligation is provided for in Article II.1 of the GATS as follows:

'With respect to any measure covered in this Agreement, each member shall accord immediately and unconditionally to services and service suppliers of any other Member no less favourable treatment that it accords to like services and service suppliers of any other country' [emphasis added].

In providing for equal treatment amongst WTO Members¹⁵⁴ this obligation provides that a WTO Member country may not favour any other country's services or service suppliers (including those of WTO Members) over another WTO Member country,¹⁵⁵ except if a Member

¹⁵⁰ Matsushita et al, 3rd Ed, P567.

¹⁵¹ WTO Trade in services division, 'The General Agreement on Trade in Services, An Introduction', available at: https://www.wto.org/english/tratop_e/serv_e/gsintr_e.pdf, (2013) P6, accessed on 20 November 2016.

¹⁵² Ibid n150.

¹⁵³ WTO E-Learning 'Introduction to Trade in Services in the WTO' (2014) available at: https://ecampus.wto.org/admin/files/Course_627/CourseContents/GATS-R8-E-Print.pdf, at Page 101, accessed on 20 November 2016.

¹⁵⁴ WTO E-Learning 'Introduction to Trade in Services in the WTO' (2014) available at: https://ecampus.wto.org/admin/files/Course_627/CourseContents/GATS-R8-E-Print.pdf, at Page 102, accessed on 20 November 2016.

¹⁵⁵ Matsushita et al, 3rd Ed, P569.

provided for MFN exceptions.¹⁵⁶ Furthermore, should there be any such favouritism, the same favour must immediately be extended to all other WTO Members in an automatic fashion and without further conditions being imposed.¹⁵⁷

Based on the above interpretation of the MFN treatment obligation, the author's view is that the MFN treatment obligation will not be affected by the promulgation of the RLHB. This is simply because the prohibition of FOAL will probably apply equally to all foreigners and therefore to all services providers in other WTO Member countries. It has been said this principle aims to prevent abrasions and distortions due to '*power-based (bilateral) policies*' and ensures that trading rights do not depend on a single Member's political and economic influence.¹⁵⁸ These aims cannot therefore be applicable to the implementation of domestic laws, like the RLHB, which aims to benefit only itself and no other WTO Member.

(b) In respect of the Basic Transparency Obligation:

This general obligation of WTO Members seems especially relevant now considering the talks of the RLHB being introduced in the near future. Transparency is guaranteed to WTO Members in Article III of the GATS which provides, *inter alia*, that each Member must:

- (i) Publish all relevant measures of general application affecting the operation of the GATS – promptly and at the latest upon entry into force;¹⁵⁹
- (ii) Make publicly available any such information if publication is impracticable ;¹⁶⁰
- (iii) Promptly or annually inform the Council for Trade in Services of the introduction of any new, or changes to existing laws, regulations and administrative guidelines possibly significantly affecting trade in services covered by specific commitments ;¹⁶¹ and
- (iv) Be open to requests for further information by other WTO members regarding the RLHB.¹⁶²

¹⁵⁶ Article II:2 of the GATS.

¹⁵⁷ Article II:1 as discussed in Matsushita et al, Page 619 and Matsushita et al, 3rd Ed, Page 571.

¹⁵⁸ WTO Website, 'Gats Training Module: Chapter 1, Basic Purpose and Concepts', available at: https://www.wto.org/english/tratop_e/serv_e/cbt_course_e/c1s6p1_e.htm, accessed on 14 January 2017.

¹⁵⁹ Article III:1, GATS.

¹⁶⁰ Article III:2, GATS.

¹⁶¹ Article III:3, GATS.

In respect of South Africa's responsibility in terms of Article III:3 towards the WTO, my research revealed that South Africa has recently informed the WTO of its trade policies on goods and services by the publication of the *'Trade Policy Review: Southern African Customs Union (Namibia, Botswana, Swaziland, South Africa and Lesotho)'*.¹⁶³ This document lists South Africa's trade policies by sector and by measure which seem to relate to trade in goods and services. An overview of this document did not reveal any policy changes regarding the restriction of FOAL. Should South Africa wish to implement the RLHB, it will therefore it seems, have to update this Trade Policy Review or inform the WTO otherwise. Nevertheless, the possibility of the Bill seems widely publicised in South Africa already and the Government has been fairly open about this possibility in its official announcements and publications¹⁶⁴ and therefore its Transparency obligation seems complied with.

2.2.2 Promulgation of the RLHB is Likely to Violate SA's Specific GATS Commitments

2.2.2.1 Background to SA's Specific Commitments

In addition to the general obligations which South Africa has in common with other WTO Members under the GATS, the country also undertook certain separate sector-specific commitments when the Agreement entered into force in 1995.¹⁶⁵ These commitments emerged as soon as the Government agreed to include particular commitments in relation to the service sectors it dedicated to international trade, in South Africa's Schedule of Commitments (the

¹⁶² Article III:5, GATS.

¹⁶³ Annex 4, South Africa, available at: https://www.wto.org/english/tratop_e/tpr_e/s324-03_e.pdf, Pages 280 - 359.

¹⁶⁴ Ibid n1&2.

¹⁶⁵ Member Information, 'South Africa and the WTO', available at:

(https://www.wto.org/english/thewto_e/countries_e/south_africa_e.htm, accessed on 13 January 2017.

‘GATS Schedule’). As such, these commitments are binding on the Government unless and until they are modified or withdrawn, which is a complex process and will be discussed below.¹⁶⁶

South Africa’s specific commitments in favour of foreign services from other WTO Member countries, as with other WTO members, are: the Market Access Commitments¹⁶⁷, the National Treatment Commitments¹⁶⁸ and the Additional Commitments¹⁶⁹ (the ‘**Specific Commitments**’).¹⁷⁰ This means that South Africa categorised its commitments per service sector and per Specific Commitment in its GATS Schedule. This literally entails the Schedule listing all service sectors committed by South Africa in column format opposite the headings: Market Access, National Treatment and Additional Commitments.¹⁷¹

Other than the GATS General Obligations, the Specific Commitments only bind those service sectors included in a Member’s schedule of commitments.¹⁷² In other words, only those services pertinently dedicated by Government to trade in terms of the GATS Schedule, can benefit from the Market Access and National Treatment Commitments.¹⁷³

The list of service sectors which South Africa committed to the GATS¹⁷⁴ has been described as ‘*fairly extensive*’ for a developing country because other developing countries have taken a more restricted approach.¹⁷⁵ This is because South Africa included most of its service sectors to international trade in its GATS Schedule without many restrictions, and excluded only

¹⁶⁶ WTO Website, ‘Guide to reading the GATS schedules of specific commitments and the list of article II (MFN) exemptions’, available at: https://www.wto.org/english/tratop_e/serv_e/guide1_e.htm, accessed on 13 January 2017.

¹⁶⁷ Article XVI, GATS.

¹⁶⁸ Article XVII, GATS.

¹⁶⁹ Article XVIII, GATS.

¹⁷⁰ Matsushita et al, Page 641.

¹⁷¹ Ibid note 170.

¹⁷² Matsushita et al, 3rd Ed, P591.

¹⁷³ Matsushita et al, 3rd Ed, P585.

¹⁷⁴ The service sectors for which South Africa scheduled specific commitments in the GATS Schedule, as generally contained in most schedules of commitments of WTO Members, include: Business services (including for example, legal, auditing, taxation, architectural, engineering, medical and dental services); Computer Services; Real estate services involving own or leased property; Rental/leasing services; Construction and related services; Environmental services (including for example: storage services, refuse disposal and sanitation); Financial services (including for example: all insurance services, banking and other financial services); Tourism and travel related services (including for example: hotels and restaurants, travel agencies, tour operator services and tourist guide services); Courier service; Telecommunication Services; Transport Services; Distribution services (including for example: wholesale trade, retailing services and franchising) and; Others.

¹⁷⁵ Scott Sinclair, ‘The GATS, South African local governments and water services’ (2005), Available at: https://www.policyalternatives.ca/sites/default/files/uploads/publications/National_Office_Pubs/2005/brief6_2.pdf, at Page 2, accessed 20 November 2016.

a few governmental services from the Schedule. Despite this, there are suggestions that South Africa has been requested by other WTO Members such as the European Union and the United States to commit more services to its GATS Schedule especially energy,¹⁷⁶ water and sanitation services.¹⁷⁷

Where any of the service sectors are made subject to conditions imposed by the Government affecting any of the Specific Commitments, such conditions are inserted under the relevant Commitment's heading. The Specific Commitments contained in the GATS Schedule furthermore, can be divided in both horizontal and sector-specific commitments which may be different per mode of service supply.¹⁷⁸ Horizontal commitments are the restrictions listed per mode of supply in the Schedule that are applicable to all service sectors contained therein, unless specified otherwise.¹⁷⁹ Sector-specific commitments are those restrictions included per specific service sector and mode of supply and do not apply to all sectors.¹⁸⁰

Furthermore, each of the service sectors contained in the schedules of commitments of all WTO Members are divided into four modes of supply.¹⁸¹ These include: (i) **Mode 1: cross border supply** – services supplied from one country to another (for example: international satellite television where the service provider and the consumer are in different countries); (ii) **Mode 2: consumption abroad** – consumers or firms make use of a service in another country (for example: tourism where the consumer goes abroad, to where the service provider is situated); (iii) **Mode 3: commercial presence**: a service provider from one country establishes a '*commercial presence*' in the host country where the service is provided. This has also been described as when a service provider of a WTO Member launches a '*territorial presence*', by, for instance, owning or leasing a business in the area of another WTO Member for services

¹⁷⁶ Ian Steuart, 'Liberalization of Trade in Services in South Africa: The Multilateral Dimension', (2005), Human Sciences Research Council, School of Economic and Business Sciences, University of the Witwatersrand, Johannesburg, available at: <https://www.gtac.gov.za/Research%20Repository/Liberalisation%20Trade%20in%20Services%20in%20South%20Africa%20The%20Multilateral%20Dimension.pdf>, Page 26, accessed on 15 January 2017.

¹⁷⁷ Ibid n175, P8.

¹⁷⁸ Petros C. Mavroidis & Mark Wu, *The Law of the World Trade Organization (WTO), Documents, Cases & Analysis* (2013) 2nd Ed, Page 780; WTO Guidelines For The Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS), (2001), P9.

¹⁷⁹ Matsushita et al, 3rd Ed, P591.

¹⁸⁰ Ibid n179.

¹⁸¹ Article I.2, GATS.

provided (for example: domestic subsidiaries of hotel chains);¹⁸² and (iv) Mode 4: **presence of natural persons** – individuals travel from their own country to supply services in another country (for example: models or consultants).

These modes of supply are relevant because an enquiry into whether the promulgation of the RLHB violates any of South Africa's specific commitments as contained in the GATS Schedule, requires an understanding of which mode of supply will be impacted by the RLHB's promulgation. This is because the RLHB might not affect all modes of supply as not all foreign services providers interested to trade in South Africa intend to acquire ownership of agricultural land here for the supply of their services.

Examples of WTO Members who have entered land ownership restrictions in their GATS Schedules include: Singapore, Thailand and Indonesia.¹⁸³ Generally, it seems that the kind of land acquisition restrictions amongst these countries vary between simply requiring the reporting of the acquisition of foreign ownership and those countries that outright ban foreign ownership of land.¹⁸⁴ The following extracts taken from Indonesia's and Thailand's GATS schedules illustrate how these countries have formulated, among others, their land ownership restrictions in their schedules.¹⁸⁵

Note how these restrictions which are highlighted in bold below, are inserted under the horizontal commitments in either in the Market Access and National Treatment column and under the commercial presence mode of supply:

¹⁸² WTO Website, '*The General Agreement on Trade in Services (GATS): objectives, coverage and disciplines*', available at: https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm, accessed on 4 December 2016.

¹⁸³ Richard Ming Kirk Tan, 'Restrictions on the foreign ownership of property Indonesia and Singapore compared' (2004), *Journal of Property Investment & Finance*, Vol. 22 Iss 1 pp. 101 – 111, Page 102, available at: <http://www.emeraldinsight.com/doi/full/10.1108/14635780410525162>, accessed on 13 January 2017.

¹⁸⁴ Ibid n183.

¹⁸⁵ Available online at: <http://www.esf.be/pdfs/GATS%20UR%20Commitments/Indonesia%20SoC.pdf> for Indonesia and at: <http://www.esf.be/pdfs/GATS%20UR%20Commitments/Thailand%20-%20UR%20Schedule%20of%20Commitments.pdf>, for Thailand, accessed on 13 January 2017.

A. Table: 1 Indonesia's horizontal commitments in respect of land ownership restrictions

INDONESIA - SCHEDULE OF SPECIFIC COMMITMENTS			
Modes of supply: 1) Cross-border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons			
Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
ALL SECTORS INCLUDED IN THIS SCHEDULE	<p>1)...</p> <p>2)...</p> <p>3)...</p> <p>ii) <u>not more than 49% of the capital share of the Limited Liability Enterprise</u> (Perseroan Terbatas/PT), may be owned by foreign partner(s)</p>	<p>1)...</p> <p>2)...</p> <p>3)...</p> <p>ii) not more than 49% of the capital share of the Limited Liability Enterprise (Perseroan Terbatas/PT), may be owned by foreign partner(s).</p> <p>3)...</p> <p>Land Acquisition Undang-Undang Pokok Agraria (Land Law) No. 5 of 1960 stipulates that <u>no foreigners (juridical and natural persons) are allowed to own land.</u> However, a joint venture enterprise could hold the right for land use (Hak Guna Usaha) and building rights (Hak Guna Bangunan),</p>	

		and they may rent/lease land and property. 	
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B. Table: 2 – Thailand's horizontal commitments in respect of land ownership restrictions

THAILAND - SCHEDULE OF SPECIFIC COMMITMENTS			
Modes of supply: 1) Cross-border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons			
Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
ALL SECTORS INCLUDED IN THIS SCHEDULE	3)..... 3)..... 4)..... 3), 4) Regarding acquisition and usage of land according to the Land Code of Thailand, foreign nationals or domestic companies which are deemed foreigners are not allowed to purchase or own land in Thailand. However, they may lease land and own buildings. Foreigners are also allowed to own part of condominium units under the laws and	3)Unless otherwise specified, national treatment for this mode of delivery is unbound 	

	regulations governing the ownership of condominiums.		
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The next section of this Chapter will look more closely at South Africa's Specific Commitments horizontally and sector-specifically in relation to the commercial presence mode of supply (Mode 3) alongside the RLHB.

2.2.3 How the RLHB May be in Conflict with SA's Specific GATS Commitments once Promulgated

Having seen how land ownership restrictions are usually incorporated in GATS schedules of specific commitments, this section will determine if the promulgation of the RLHB will be in compliance with South Africa's Specific Commitments of Market Access and National Treatment.

When weighing-up the RLHB against the GATS Schedule, a closer inspection of the GATS Schedule is necessary. This is because in order for the Bill to be lawful in terms of the Specific Commitments, its content must comply with the promises which South Africa made in its GATS Schedule.¹⁸⁶ For the purposes of this thesis, the focus will, however, be on the country's Market Access and National Treatment Commitments in relation to services involving Mode 3 suppliers only. As mentioned before, these relate to when service providers of other WTO Member countries wish to establish a commercial presence in the territory of South Africa by investing, for example, in immovable property here.

In this regard, a '*Commercial Presence*' is defined in terms of Article XXVIII(d) of the GATS as follows:

'... (d) "**commercial presence**" means any **type of business or professional establishment**, including through

¹⁸⁶ Articles XVI and XVII of the GATS.

- (i) *the constitution, acquisition or maintenance of a **juridical person**, or*
 - (ii) *the creation or maintenance **of a branch** or a representative office,*
- within the territory of a Member for the purpose of supplying a service;...*

Furthermore, what is meant by a ‘*juridical person*’ can be found in Article XXVIII(n) of the GATS which provides that it means:

‘...

- (i) *“owned” by persons of a Member if more than 50 per cent of the equity interest in it is beneficially owned by persons of that Member;*
- (ii) *“controlled” by persons of a Member if such persons have the power to name a majority of its directors or otherwise to legally direct its actions;*
- (iii) *“affiliated” with another person when it controls, or is controlled by, that other person; or when it and the other person are both controlled by the same person;’*

As mentioned above,¹⁸⁷ the RLHB will prohibit ownership in agricultural land by foreign nationals (individuals) and by juristic persons when the majority of its shares are foreign owned or controlled. This description of foreign owned entities that will be prohibited from owning agricultural land relate to the way in which juridical persons may establish a commercial presence in terms of the GATS as set out above. Under Article XXVIII(n)(ii), obtaining a commercial presence may involve the obtaining of a majority shareholding in a land-owning company. Furthermore, Article XXVIII(d)(i) provides that establishing a commercial presence includes owning the majority shareholding in a ‘*business or professional establishment*’ in another WTO Member country. The result of purchasing shares in a foreign business usually entails the acquisition of the business and its property, including immovable property. The GATS definition of commercial presence therefore envisages that the acquisition of a commercial presence may entail, acquiring ownership of immovable property. This therefore suggests that the RLHB, once promulgated, will prohibit the future establishment of commercial presence by those foreign services providers intending to *own* agricultural land for such purposes in South Africa.

¹⁸⁷ See section 1.1.

In this regard, it has been expressly said that the regulation of foreign land acquisition will affect and fall within the ambit of the commercial presence mode of supply.¹⁸⁸ It is essential to note though that a service provider can obtain a commercial presence in a number of ways including: the acquisition; leasing or other ways of access to land.¹⁸⁹ Therefore, since the RLHB will probably allow the leasing of agricultural land by foreigners, it does not *per se* prohibit the establishment of a commercial presence on agricultural land.¹⁹⁰ The promulgation of the RLHB will therefore not affect those foreigners intending to lease agricultural land, but merely those who want to obtain ownership rights or controlling interests in entities owning agricultural land. The focus group of foreign services providers to which this thesis applies is accordingly those intending to acquire ownership of agricultural land in South Africa.

Examples of the service sectors¹⁹¹ that might be impacted by the promulgation of the RLHB may include:

1. Tourism services

In 2016 the tourism industry was said to play a vital role in South Africa as it contributed to 9% of the GDP.¹⁹² Various foreign tourism service providers such as hotel chains, restaurants, game and wine estates have opened their doors on South African farms.¹⁹³ Examples of these include various prestigious wine farms such: Delaire Graff Estate which is owned by Laurence Graff¹⁹⁴ and recently, Sir Richard Branson acquired the in Mont Rochelle wine farm in Franschhoek.¹⁹⁵

¹⁸⁸ Matsushita et al, Page 591; WTO E-learning, 'Detailed Presentation of Scheduling Specific Commitments in Trade in Services', available at: https://ecampus.wto.org/.../GATS_Sch-L2-R1-E.doc, Page 17 accessed on 13 January 2017.

¹⁸⁹ WTO Website, 'The General Agreement on Trade in Services (GATS): objectives, coverage and disciplines' available at: https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm, accessed on 21 January 2017.

¹⁹⁰ The President has been quiet on whether foreigners will be eligible for short term leases of agricultural land.

¹⁹¹ Ibid n174.

¹⁹² Brand South Africa, 'South Africa exceeds foreign investment target by R20-billion' (2016), <https://www.brandsouthafrica.com/investments-immigration/business/trends/global/fdi-increase-040316>.

¹⁹³ Nick Hedley, 'Marriott brings its brands to South Africa's Hospitality Market' (2014) available at: <http://www.bdlive.co.za/business/transport/2014/04/24/marriott-brings-its-brands-to-sas-hotel-market>.

¹⁹⁴ <http://www.delaire.co.za/>.

¹⁹⁵ Mont Rochelle official website: Available at: <http://www.virginlimitededition.com/en/about-us>, accessed on 13 March 2017.

By banning FOAL the services offered by foreign hotels,¹⁹⁶ restaurants and wine farms – interested only in owning as opposed to leasing agricultural land - will be prevented from entering our tourism market. In addition, existing foreign owners will be restricted to selling their farms willing South African buyers. From the policy background of the RLHB and from media reports, however, it seems that Government is targeting foreign agricultural land ownership relating to the tourism sector by its promulgation.¹⁹⁷

The GATS Schedule shows that South Africa's GATS Specific commitments for the tourism sector are fully liberalised in respect of the commercial presence mode of supply. This is because it contains no commercial presence limitations horizontally or specifically in relation to the tourism sector *vis a vis* ownership of agricultural land.¹⁹⁸ WTO members in the tourism industry are therefore currently free to open branches on agricultural property which they may own. As will be seen below, there are various reasons why foreign investors would rather own land.¹⁹⁹

2. Construction Services:

Another sector which does not only involve agricultural land, but all land in general, relate to those construction services involving property developers seeking to develop large portions of land for residential, commercial and other purposes. Examples of such developments refer to residential estates, golf estates, holiday resorts, commercial developments, etc.

3. Manufacturing Services:

Here I refer to those services conducted on farms owned and run by foreigners involving the production of goods such as dairy products, leather products, etc.

¹⁹⁶ For a list of various tourism services as classified by Statistics South Africa please view: "*Draft Tourism Satellite Account for South Africa*", (2009), available at: <http://www.sanews.gov.za/south-africa/limiting-foreign-land-ownership-international-practice>, at Page 47.

¹⁹⁷ Press Statement by the Parliament of South Africa; President Jacob Zuma: Response to Debate on the State of the Nation Address, dated 18 February 2016; available at: http://www.parliament.gov.za/live/content.php?Item_ID=8705&Revision=en/82&SearchStart=0; and at <http://www.sanews.gov.za/south-africa/limiting-foreign-land-ownership-international-practice>.

¹⁹⁸ South Africa's Schedule of Commitments, at Page 16.

¹⁹⁹ See page 48 of this Dissertation under Paragraph iv.c.

Finally, on inspection of South Africa's GATS Schedule,²⁰⁰ it appears that there are no restrictions on its '*commercial presence*' commitments specifically relating to the ownership of land in general, let alone agricultural land, under both its horizontal and its sector-specific commitments – for any of its dedicated service sectors. Similarly, no reference is made to any restrictions on land ownership under the sector-specific commitments which mostly reflect the word '*None*'²⁰¹ for Mode 3 supplies of services listed per Specific Commitment and in any event, none of the commercial presence commitments relate to land as can be seen from the below extract:

C. Figure: 3 – South Africa's horizontal commitments indicate no land ownership restrictions

SOUTH AFRICA - SCHEDULE OF SPECIFIC COMMITMENTS			
Modes of supply: 1) Cross-border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons			
I. HORIZONTAL COMMITMENTS			
Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
ALL SECTORS INCLUDED IN THIS SCHEDULE	4)Unbound, except for the temporary presence for a period of up to three years, unless otherwise specified, without requiring compliance with an economic needs test, of the following categories of natural persons providing services: 	3)Local borrowing by South African registered companies with a non-resident shareholding of 25 per cent or more is limited 4).....	

²⁰⁰ Available here: <http://www.tralac.org/files/2013/12/South-Africa-GATS-Schedule-of-Commitments.pdf>, accessed on 13 January 2017.

²⁰¹ This implies that there are no limitations specific to this sector under the relevant mode except the conditions set out in the horizontal section.

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The above implies that South Africa is currently allowing full service trade liberalisation²⁰² to its foreign services suppliers in all scheduled service sectors wishing to establish a commercial presence in SA by obtaining ownership of agricultural land.

Based on these findings, and provided the Bill leads to a complete ban of FOAL, it would seem that the implementation of the Bill could be found to be in violation of SA's specific commitments under the GATS Schedule. This is because the Bill would directly restrict all foreign services suppliers to which South Africa specifically committed openness to trade - from establishing a commercial presence here if they have not already done so, and should their establishment have involved the acquisition of agricultural land.²⁰³

In light of this, and in the remaining part of this section, the following questions will now be considered:

- 1) Which specific GATS commitment/s of South Africa will be infringed by the promulgation of the Bill?
- 2) Are there any general exemptions applicable in favour of South Africa despite such violations?
- 3) What will the possible modification of the GATS Specific Commitments entail?

²⁰² *US-Gambling case*, para. 6.279.

²⁰³ It seems that if the Bill does not have a retrospective effect, on its promulgation it may not hamper the commercial presence of those foreign service providers already in place.

2.2.4 Which Specific GATS Commitments May Be Infringed?

As mentioned before, these commitments made in relation to foreign service suppliers by all WTO Members under the GATS are provided for in Articles XVI (re '**Market Access**'), XVII (re '**National Treatment**') and XVIII (re '**Additional Commitments**') of the GATS. The first two of these commitments will now be considered in turn to determine whether they will be infringed when the Bill is enacted.

2.2.4.1 The Market Access Commitment

In terms of Article XVI of the GATS, fellow WTO Members negotiate and promise each other not to have recourse to certain proscribed measures impeding access to their markets unless they have indicated they would do so under their schedules of concessions.²⁰⁴ This commitment is also only applicable if a Member undertook a market-access commitment in relation to the supply of a service, and to not impose any new measures that would restrict entry into the market.²⁰⁵

The Market Access Commitment under Article XVI:2, will be violated by South Africa should the country impose any of the following restrictions (the '**restrictions**'), without them being contained in the GATS Schedule:

- a) the number of service providers;
- b) the total value of service transactions or assets;
- c) the total number of service operations or on the total quantity of service output;
- d) the total number of natural persons that may be employed;
- e) the forms of specific types of legal entity or joint venture; or
- f) foreign capital participation.

It seems apparent why the above restrictions are prohibited. Each of them have the potential to restrict the freedom and capacity of foreign services suppliers to obtain access to the market of a host state and expand such access to their fullest potential. They also limit a

²⁰⁴ Matsushita et al, p. 648.

²⁰⁵ Article XVI:2, GATS.

country's competitive advantage. It therefore makes logical sense that for a WTO Member to be allowed these actions, the actions have to be officially added to its GATS schedule of specific commitments in terms of Article XVI:2.

In the context of the RLHB, the legal question would therefore be in which way its promulgation restricts market access to foreign services suppliers of other WTO Members. It is the author's view that the introduction of the Bill may be seen as falling afoul of points XVI:2(e) and (f) above for the following reasons:

i. In respect of measures that restrict or require specific types or forms of legal entity or joint venture:

- a. The restriction of commercial presence relating to the exclusion of representative offices has been said to be an example of such measures.²⁰⁶
- b. Furthermore, the requirement that a joint venture be formed between foreign and local service providers in order to obtain access to a services market is only possible if the option was included in the schedule of commitments²⁰⁷ as well. This seems to entail in light of the RLHB, that it should not have the effect that foreign services providers are required to enter the market in a certain way unless the GATS Schedule provides for such an option.²⁰⁸
- c. By restricting the commercial presence of foreign property owning legal entities and thereby requiring that service suppliers owning agricultural land in South Africa forthwith be South African – the RLHB could fall into the ambit of limitation (e).

ii. In respect of measures limiting the participation of foreign capital:

- a. It has been said that this limitation (f) relates to the imposition of: (i) '*maximum percentage limits*' of participating foreign capital, (ii) the '*maximum*' amount to be invested, or (iii) foreign equity ownership of more than 50% in a domestic juristic person.²⁰⁹

²⁰⁶ Petros C Mavroides & Mark Wu, *The Law of the World Trade Organisation (WTO) – Documents, Cases & Analysis*, 2nd Ed (2013) Pages 784 – 785.

²⁰⁷ XVI:2(e), GATS.

²⁰⁸ Panagiotis Delimatsis and Martin Molinuevo, 'Article XVI Market Access', available at: https://www.researchgate.net/profile/Panos_Delimatsis/publication/228157512_Article_XVI_GATS_Market_Access/links/0deec5215c9cfa241f000000/Article-XVI-GATS-Market-Access.pdf, Page 15, accessed on 28 January 2017.

²⁰⁹ Ibid note 208, Page 16.

- b. This means that measures which restrict the value of foreign investment in South Africa are restricted considering that the purchasing and developing of owned land necessarily involves greater foreign capital investment than leasing land. Should the Bill accordingly, restrict foreign ownership of South African owned juristic persons owning immovable property, because such restriction is not included in the GATS Schedule, Article XVI:2 would be violated.

2.2.4.2 The National Treatment Commitment

The last, but certainly not the least important Specific Commitment to be discussed in the context of the RLHB, which South Africa has undertaken under the GATS, is the National Treatment Commitment. This commitment is provided for as follows in Article XVII:1:

*'In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, **treatment no less favourable than that it accords to its own like services and service suppliers.**'* [Emphasis added.]

According to the WTO website,²¹⁰ this commitment can be interpreted as: WTO Members not being allowed to operate '*discriminatory measures*' benefitting domestic services or service suppliers, and which modify competition conditions in favour of a member's own service industry above those of other WTO Members.

Dissimilar to the Market Access commitment under the GATS, the National Treatment commitment does not seem to include a *numerus clausus* of limitations. The Panel in the *EC Bananas III* case found that the national treatment commitment constitutes a specific commitment because it binds a WTO Member '*only in sectors or sub-sectors which that Member has inscribed in its schedule and to the extent specified therein.*'²¹¹ The Panel furthermore found that by indicating '*none*' in the national treatment column of a schedule of commitments, a WTO

²¹⁰ WTO website, available at: https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm, accessed on 21 January 2017.

²¹¹ Panel Decision in *EC-Bananas III* case, Para7.305.

Member undertook ‘*a full commitment on national treatment*’²¹² in a relevant sector in relation to a relevant mode of supply.

To determine whether a measure is in line with a country’s specific national treatment commitments, the Panel in this case²¹³ further provided for the test to establish inconsistency of a particular measure implemented by a WTO Member with article XVII of the GATS.²¹⁴ The test entails the demonstration of three elements namely that:²¹⁵ (i) a Member undertook a ‘*specific commitment in a relevant sector and mode of supply*’; (ii) the adopting or applying of a measure ‘*affecting the supply of services*’ in the relevant sector or mode of supply;²¹⁶ and (iii) this measure leads to one Member treating the service providers of ‘*any other Member*’ less favourably than its ‘*own like service suppliers*’.²¹⁷ According to writers like Matsushita et al, the three elements that comprise this test must exist cumulatively.²¹⁸ In the context of the RLHB, a claimant taking issue with the Bill will therefore have to argue along the lines of this test under the following *four* headings:

i. South Africa undertook specific commitments to the applicable service sector and to a mode of supply:

- a. This has been said to be a factual enquiry.²¹⁹ The claimant must show that South Africa’s GATS Schedule contains horizontal and sector specific National Treatment commitments in respect of the particular service sector complained of.
- b. As stated before, South Africa’s Schedule currently contains most service sectors with the exception of few. A potential claimant will therefore have to show that South Africa bound a particular service subsector as regards a service supplied through the commercial presence mode of supply without conditions.²²⁰

²¹² Panel Decision in *EC-Bananas III* case, Para7.306.

²¹³ Panel Decision in *EC-Bananas III* case, Para7.314.

²¹⁴ Matsushita et al, Page 662.

²¹⁵ Panel Decision in *EC-Bananas III* case, Para4.632.

²¹⁶ Ibid n215, Para4.633.

²¹⁷ Ibid n215.

²¹⁸ Matsushita et al, Page 662.

²¹⁹ Ibid n178, P788.

²²⁰ Ibid n213, Para 7.306.

- c. The GATS Schedule currently shows full commitment in all service sectors and modes of supply in relation to foreign ownership of land because the Schedule contains no such land ownership restrictions.

ii. South Africa adopted a measure which affects the supply of services in the claimant's sector and mode of supply:

- a. It has been found that the '*supply of services*' via a commercial presence in terms of Article XXVIII:(b) comprises '*the production, distribution, marketing, sale and delivery of a service*'.²²¹ Therefore, a claimant will have to prove that the service in question, which is delivered on agricultural land, is affected by the promulgation of the RLHB.
- b. For example, a service provider in a particular service sector (for example, in the hotel industry) – will therefore, have to prove that the prohibition prevents it from having a commercial presence in South Africa (for example, by owning hotels or holiday resorts on owned agricultural land).²²²

iii. The relevant measure is applied to foreign like services or services suppliers:

- a. The claimant will, in the context of the Bill, have to show that by implementing the Bill, the '*like*' foreign services suppliers in, for example, the foreign hospitality industry will be affected by the ownership prohibition, while the domestic hospitality industry will not be affected.
- b. The Panel in the EC Bananas III case found, inter alia, that as long as the domestic and foreign entity provide the same service, they can be considered like service suppliers.²²³

iv. The measure treats foreign services or service suppliers less favourably than their domestic counterparts:

- a. A claimant will have to show that the Bill favours the relevant South African services sectors involving agricultural land, for example, the South African hospitality industry over the foreign hospitality industry.

²²¹ Panel report of EC-Bananas case, Para. 7.316.

²²² See the discussion of what constitutes a '*measure*' under section 2.2.

²²³ Panel report of EC-Bananas case, Para. 7.322.

- b. The RLHB places a ban on FOAL, while at the same time not prohibiting but restricting domestic ownership to 12000 hectares. It would therefore seem quite obvious that domestic service providers, for example, hotels or resorts in the tourism industry, will be treated more favourably by the promulgation of the Bill.
- c. Some advantages of owning, as opposed to leasing land are that, as the most comprehensive right (within the confines of the law),²²⁴ ownership secures the right to: derive income and financial stability from the land,²²⁵ consume, dispose of and mortgage it.²²⁶ Furthermore, studies have shown that FDI in ‘arable’ land in developing countries have increased over the years due to FDI in the agricultural sector being ‘closely linked’ to FDI in arable land.²²⁷ Investing in such land is seen to ‘secure and control’ access what is produced there. While leasing land may be the easiest way to gain a commercial presence, the main disadvantage is that leasing rights are dependent on the rights of the owner which may be taken away, for example, by sequestration.

It is the author’s view that by introducing the Bill, the country may be in violation of its GATS National Treatment Commitments as it has not made provision for any exemptions under Article XIV of GATS and it has indicated no limitations on the importation of, for example, tourism, construction or other services in the GATS Schedule relating to ownership of agricultural land.

The rest of this Chapter will now be dedicated to investigating some of the options South Africa have in light of the potential GATS violations and specifically, what South Africa will have to do in order to bring the RLHB in line with its GATS specific commitments. Firstly, I will deal with possible justification grounds which South Africa may raise in the event of another WTO Member complaining about the Bill. Secondly, I will discuss the option to modify or withdraw some of the country’s relevant commitments under Article XXI of the GATS. This, it

²²⁴ Badenhorst, Pienaar and Mostert, *Silberberg & Schoeman, The Law of Property*, 5th Ed, 2006, P91.

²²⁵ Available at, <http://www.businesspartners.co.za/media-room/posts/business-partners-continue-to-see-value-in-sa-commercial-property-1091/>

²²⁶ Badenhorst et al, op cit n224, P92-93.

²²⁷ GTZ, ‘Foreign Direct Investment (FDI) in Land in Developing Countries’, (2009) available at: <https://www.giz.de/fachexpertise/downloads/Fachexpertise/giz2010-en-foreign-direct-investment-dc.pdf>, P6, accessed 12 March 2017.

seems, is what South Africa has been prompted to do relatively often recently, albeit for various other new legislation.²²⁸

2.3 GATS General Exceptions

A discussion of the violations of South Africa's General Obligations and Specific Commitments is incomplete without considering Article XIV of the GATS providing for general exceptions. Hereby violations of the obligations and commitments under the GATS may be condoned in exceptional circumstances. This GATS Article is vital for South Africa as it demonstrates why the Government should seriously consider the possible modification of its GATS Commitments in relation to the RLHB.

In the event of a fellow WTO Member officially complaining of the implementation of the RLHB due to any of the possible violations discussed in the previous section, South Africa will have to legally justify such implementation. This will likely involve high standards of review of the country's public policies underlying the prohibition of FOAL, as will be demonstrated in this section.

The most relevant general public interest exceptions are as follows:

*'Subject to the requirement that such measures are **not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries** where like conditions prevail, or a disguised restriction on trade in services, **nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:***

- (a) *necessary to protect public morals or to **maintain public order**;*
- (b) ...

²²⁸ JB Cronje, 'Will South Africa Modify its GATS Commitments?' (2015), available at:

<http://www.tralac.org/discussions/article/7183-will-south-africa-modify-its-gats-commitments.html>; & WTO E-Learning 12, 'Introduction to Trade in Services in the WTO', available at:

https://ecampus.wto.org/admin/files/Course_385/Module_1568/ModuleDocuments/GATS-L1-R1-E.pdf, Page 23 & Gerhard Erasmus, 'The Regulation of Private Security Firms in South Africa: What are the Governance Signals?' (2014) available at: <http://www.tralac.org/discussions/article/5715-the-regulation-of-private-security-firms-in-south-africa-what-are-the-governance-signals.html>; Scot Sinclair, 'The GATS and South Africa's National Health Act a Cautionary Tale' available at

(http://www.municipalservicesproject.org/sites/municipalservicesproject.org/files/publications/OccasionalPaper11_Sinclair_The_GATs_and_South_Africa%27s_National_Health_Act_A_Cautionary_Tale_May2006.pdf) (2006), Municipal Services Project, Occasional Papers Series 11, accessed 16 January 2017.

(c) ...

*Footnote 5: The public order exception may be invoked **only** where **a genuine and sufficiently serious threat** is posed to one of the **fundamental interests of society**....' [Emphasis added]*

According to Cottier et al, Article XIV and its counterpart in the GATT, namely Article XX, upon which Article XIV is modelled, are the 'cornerstones' of international trade.²²⁹ According to them, the Articles support the 'legitimate non-economic policy objectives' of WTO Members while simultaneously, seeking to prevent the misuse of the GATS general exceptions 'to pursue rent-seeking, protectionist policies, undermining existing obligations and commitments.'²³⁰

To determine if South Africa will be allowed any justification under Article XIV(a) this established two-tier test, as developed in cases like the *US-Gambling* case²³¹ and the *China – Audiovisual Entertainment Products* case,²³² should be followed.²³³ This entails proving that the implementation of the RLHB as a GATS measure, is both:

- (i) Preliminarily justified under the public order exception as provided for in Article XIV(a) and - is *necessary* to protect the interests (namely: land reform) intended to be protected thereby ('**question 1**'); and
- (ii) In line with the principles laid down in the *chapeau*, namely it is not arbitrary, discriminatory or trade restrictive ('**question 2**').

For question 1:

To simplify one's understanding of the two-tier test, one could use the AB's application of Article XIV in relation to the shifting of the burden of proof between a complaining and

²²⁹ T. Cottier, Delimatsis P & Diebold, N., 'Article XIV, General Exceptions,' *Max Planck Commentaries On World Trade Law, Wto - Trade In Services*, Rüdiger Wolfrum, Peter-Tobias Stoll, Clemens Feinäugle 6 (2008), P2.

²³⁰ Ibid n229, P2.

²³¹ Panel Report in *US – Gambling* case, Para 6.449.

²³² AB Report in *China - Audiovisual Entertainment Products* case, Para5.14.

²³³ Ibid n229, P5 & n178, P804.

responding party during the investigation of a complaint.²³⁴ In the event of a GATS obligation being found *prima facie* infringed,²³⁵ a responding WTO Member will naturally raise the justification grounds first.

According to Cottier et al, the first question would then be answered by determining initially the content of the policy objective sought by the implementation of the measure.²³⁶ Applied to the RLHB, South Africa would accordingly have to show that the land reform objective of the Bill falls under at least one of the public interest considerations as listed in Article XIV. It is the author's view that the possible justification ground in terms of Article XIV which South Africa could possibly argue in its favour is Article XIV(a) as it relates to the ground of public order. If it can be proven that the RLHB's objective falls under Article XIV(a), it would imply that it is provisionally justified.²³⁷

According to Cottier et al, as part of this first step South Africa will have to show that the trade of the services in question (i.e. the trade in foreign services involving FOAL in South Africa), harms or endangers the aims of the domestic policy in question (namely, prohibiting FOAL for land reform purposes).²³⁸ This step can also involve the consideration if the measure (the RLHB) is designed to mainly protect the public order.²³⁹

The Panel in the *US-Gambling* case defined public order as follows: '*the preservation of the fundamental interests of a society, as reflected in public policy and law. These fundamental interests can relate, inter alia, to standards of law, security and morality.*'²⁴⁰ Furthermore, the

²³⁴ *US – Gambling* case, Para 309-311.

²³⁵ Glyn Ayres & Andrew D Mitchell, 'General and Security Exceptions under the GATT And The GATS', (2011), available at: <https://poseidon01.ssrn.com/delivery.php?ID=325026118089094119103095070080094010034050058012070082112080114071107007085089088099038035127124020121002006074019073111123116105060069010052122008093100099013008030073037024086030007026031070031004025069020086086068065085019108119116116010022087010&EXT=pdf>, Page 5, accessed on 18 January 2017.

²³⁶ *US-Gambling* case, para 6.467.

²³⁷ Cottier et al, Page 6.

²³⁸ Cottier et al, Page 5.

²³⁹ Cottier et al, Page 6.

²⁴⁰ Ibid note 235, Page 7.

²⁴⁰ Panel Report, *US-Gambling* case, para 6.467.

application of the public order exception is restricted²⁴¹ to only those instances where genuine and sufficiently serious threats are posed to a '*fundamental interest of society*'.²⁴²

In respect of the second part of question 1 above: the next question is whether the RLHB's promulgation is '*necessary*'²⁴³ to prevent genuine and sufficiently serious threats to a fundamental interest of society, which may include: access to land for all South Africans, the prevention of food shortage and achieving equality amongst South Africans.²⁴⁴ For this a '*necessity test*' under Article XIV(a) is to ensure that a distinction is drawn between measures fulfilling important policy and those measures that involve protectionism.²⁴⁵ This test, according to the Panel in the *US-Gambling* case, is an objective one²⁴⁶ and consists of the weighing and balancing of various factors.²⁴⁷ It basically entails the enquiry of whether the Bill is vital to achieve the relevant public policy, namely land reform.

It has been said, that the outcome of a judicial investigation will depend on the significance of the interest to be protected and that proving necessity is a cumbersome task.²⁴⁸ This is because it consists of various steps which have been developed over years of mainly GATT jurisprudence. The test first entails a balancing of the importance of the objective (as per Article XIV) which the measure is designed to achieve - against whether the measure will actually contribute to such objective and whether and to what extent it will limit international trade.²⁴⁹ In other words, once it has been determined that the Bill will materially contribute²⁵⁰ to the public policy goal of land reform and ultimately, equality amongst South Africans, this needs to outweigh the RLHB's trade restrictive effect.²⁵¹ Once this is established, the Bill will be *prima facie* justified.²⁵²

²⁴¹ Cottier et al, P8.

²⁴² Article XIV(a) must be read together with footnote 5 of Article XIV which qualifies the application of the public order exception.

²⁴³ This requirement is contained under Article XIV in relation to the importance of the measure implemented.

²⁴⁴ See the policy discussion under section 1.2.

²⁴⁵ Cottier et al, P19.

²⁴⁶ Appellate Body Report, *US - Gambling* case, Para304.

²⁴⁷ Appellate Body Report, *US - Gambling* case, Para305.

²⁴⁸ Cottier et al, P3.

²⁴⁹ Ibid n235, P17.

²⁵⁰ AB Report, *Brazil- Retreaded Tyres*, Para150.

²⁵¹ AB Report, *China-Publications and Audiovisual Products*, Para310.

²⁵² Panagiotis Delimatsis, 'Protecting Public Morals in a Digital Age: Revisiting the WTO Rulings on US-Gambling and China – Publications and Audiovisual Products', (2011) *Journal of International Economic Law*, 14(2) P264.

Once South Africa as respondent has established the existence of a *prima facie* justification of the Bill, the onus of proof will shift to the complainant Member who has to prove that the respondent had alternative options that do not restrict the international commerce and that therefore, the Bill's implementation cannot be justified.²⁵³ Here the complainant Member will have to prove, for example, that the Bill need not be implemented to achieve South Africa's land reform goals as there are other less trade restrictive alternatives reasonably available. Moreover, an alternative measure is one that is not only reasonably available, but also capable of achieving the respondent's desired level of protection as sought under Article XIV.²⁵⁴

The onus will then shift back to South Africa who will have to prove that the challenged measure is still necessary, or that the proposed alternative measure is not reasonably available, or that it cannot achieve the same level of protection or attain the objective pursued.²⁵⁵ In the context of the Bill, the enquiry the country therefore has to make is whether there exists any alternatives to the outright prohibition of FOAL that can achieve the same public policy that is less trade restrictive.

For question 2:

In terms of the chapeau of Article XIV, the exceptions provided for will only be applicable if the manner in which the measure is applied does not constitute '*arbitrary or unjustifiable discrimination or ... a disguised restriction on trade in services*'. According to the AB in the *US - Gambling* case, this chapeau fulfils the function of ensuring that the measure is in good faith.²⁵⁶ It also ensures that the relevant WTO Member instituting the measure, acts reasonably toward other WTO Members in the way that the measure is implemented by not frustrating their substantive GATS rights.²⁵⁷

To determine whether the application of the RLHB's promulgation is consistent with the chapeau, South Africa will have to prove that cumulatively it will not entail:²⁵⁸ (i) arbitrary

²⁵³ Ibid n235, P20.

²⁵⁴ AB Report, *US Gambling case*, Para.308.

²⁵⁵ Ibid note 235, P21.

²⁵⁶ AB Report, *US-Gambling case*, para339.

²⁵⁷ AB Report, *US-Shrimp case*, paras156 – 158.

²⁵⁸ Appellate Report, *US – Shrimp case*, Para150 and applied in Panel Report, *US-Gambling case*, Para6.581.

discrimination between countries where the same conditions prevail (ii) unjustifiable discrimination between countries where the same conditions prevail; or (iii) amounts to a disguised international trade restriction.

Firstly, for the RLHB to amount to ‘*arbitrary or unjustifiable*’ discrimination, it must involve: (a) discrimination (b) which has an arbitrary or unjustifiable character; and (c) the discrimination occurs between countries where the same conditions prevail.²⁵⁹ In the *US-Gambling case*, the Panel relied on the *US-Shrimp case* to find that the nature and quality of the discrimination under the chapeau is different than under the substantive GATS obligations because this discrimination relates to the manner in which the measure is applied.²⁶⁰ Discrimination, was found to exist when a measure prohibiting the remote supply of gambling services was applied in an inconsistent manner - as between domestic and foreign services or service suppliers.²⁶¹

Secondly, WTO adjudicating bodies have wide discretions to determine, based on sufficient evidence, what constitutes ‘*arbitrary*’ or ‘*unjustifiable*’ discrimination – which must exist before a measure will be found inconsistent with the chapeau of GATS.²⁶² To illustrate this, Cottier et al suggested an approach similar to the one taken by the Panel in the *US-Shrimp case*. In this case, the Panel considered various factors leading to the conclusion that the United States unjustifiably discriminated on the basis of imposing an import ban on shrimp from some but not on other countries.²⁶³ These factors included that: (i) the import ban was applied unilaterally and only some but not all Members were negotiated with before its implementation;²⁶⁴ and (ii) the ban lacked flexibility because it did not take account of the circumstances of all countries involved.²⁶⁵ Regarding arbitrariness, the AB found that the import ban was not applied fairly,

²⁵⁹ Appellate Report, *US – Shrimp case*, Para150. **Note: the Panel in the US-Gambling case incorporated the Panel’s interpretation of the chapeau in the US-Shrimp case into GATS practice as well. See Para6.571.**

²⁶⁰ Panel Report, *US-Gambling case*, Para6.578.

²⁶¹ Panel Report, *US-Gambling case*, Para351.

²⁶² Ibid n229, P26.

²⁶³ AB Report, *US-Shrimp case*, Paras166-177.

²⁶⁴ AB Report, *US-Shrimp case*, Para172.

²⁶⁵ AB Report, *US-Shrimp case*, Para177.

transparently, predictably, with due process allowing for applicants to be heard or for a review process.²⁶⁶

Thirdly, what it meant by ‘*between countries where like conditions prevail*’ in the chapeau, has been interpreted by the AB²⁶⁷ to imply that the discrimination can occur, not only between different exporting Members, but also between exporting Members and the importing Member concerned.²⁶⁸

The promulgation of the RLHB will probably not discriminate between international service suppliers in South Africa because all who require ownership of agricultural land will be prohibited from owning it. However, the discussion of the chapeau above shows, that the manner in which the RLHB is applied may also not discriminate between South African and other WTO Members. South Africa will therefore, have to prove that the prohibition of only FOAL and not of national ownership of *like* agricultural land as well, does not amount to arbitrary or unjustifiable discrimination against other WTO Members. For example, the prohibition will not apply to large South African-owned wine and other farmers, who most probably own a larger portion of the country’s agricultural land required for land reform.

Finally, in order to be consistent with the chapeau of Article XIV GATS, the RLHB must not constitute ‘*disguised restriction on trade in services*’. Cottier et al, are of the view that WTO jurisprudence on this matter is limited but noted that the Appellant Body confirmed that it encompasses at least ‘*arbitrary*’ and ‘*unjustifiable*’ discrimination.²⁶⁹

From the above it follows, that in order for the possible violations of South Africa’s National Treatment and Market Access Commitments to be justified, South Africa will have to prove that the promulgation of the RLHB is not only necessary for land reform, but the manner in which it is implemented does not amount to arbitrary, unjustifiable or disguised trade. If South Africa can provide sufficient evidence justifying the promulgation of the RLHB, it may be

²⁶⁶ AB Report, *US-Shrimp case*, Para180-183.

²⁶⁷ AB Report, *US-Shrimp case*, Para150.

²⁶⁸ AB Report, *US-Shrimp case*, Para150.

²⁶⁹ Ibid n229, P27.

allowed to do so – however, it remains to be seen if the prohibition of FOAL, the extent of which is unknown, will materially support South Africa’s land reform goals.

We turn now to the discussion of how South Africa could modify or withdraw its GATS Commitments in order to avoid having to justify the promulgation of the RLHB.

2.4 Modification of SA’s Specific GATS Commitments

When a WTO Member institutes measures such as the RLHB that have the effect of violating any of the Member’s specific commitments, the general rule is that the specific commitments could be amended. It has been said, however, that the experiences of the United States and the European Union have shown, that this is not an easy task and may involve long periods of negotiation on suitable compensation.²⁷⁰

The option of modification or withdrawal is provided for in Article XXI(1)(a) of the GATS as follows:

*‘1. (a) A Member (referred to in this Article as the "modifying Member") **may modify or withdraw any commitment in its Schedule, at any time after three years have elapsed from the date on which that commitment entered into force, in accordance with the provisions of this Article.***’ [Emphasis added]

Should South Africa accordingly wish to modify or withdraw any of its Specific Commitments in relation to the implementation of the RLHB, it is clear from the wording of Article XXI(1)(a) that such amendment will be possible as more than three years have lapsed since South Africa’s GATS Schedule came into force. The amendment will have to be effected in terms of Article XXI(1)(b) with notification of the intent to do so to the Council for Trade in Services by no later than three months before the intended date of implementation of the modification or withdrawal.

²⁷⁰ Ibid n228.

Furthermore, Article XXI(2)(a) provides that the amendment process must involve the negotiation of the modified commitments with all WTO Members that constitute '*affected Members*' upon the request of such affected Members. Article XXI(2)(a) also obliges the '*modifying Member*' to negotiate with the affected Members to reach consensus on any necessary compensatory adjustment in exchange for the modification. An important implication of this negotiation is provided for by the remainder of Article XXI(2)(a) though, which provides that during the negotiations the Members must: '*endeavour to maintain a general level of mutually advantageous commitments not less favourable to trade than that provided for in Schedules of specific commitments prior to such negotiations.*' This means that compensation will entail the negotiation of a '*more ambitious binding elsewhere*' which is not less favourable than what existed before.²⁷¹ Article XXI(2)(b) finally provides that compensation adjustments must be made on a most-favoured-nation ('**mfn**') basis.

According to Article XXI(3)(a), however, which deals with the situation when WTO Members do not agree on the compensatory adjustment during the negotiations, the affected Member may refer the matter to arbitration for resolution. Should the arbitration conclude that compensation applies, the relevant commitments may not be modified until the compensatory adjustment was actually made.²⁷² If the modifying Member does not adhere to the decision of the arbitrator, affected Members may retaliate by modifying or withdrawing equivalent commitments.²⁷³ The modification or withdrawal by the affected Member will then apply only to the modifying Member and regardless of Article II of the GATS relating to MFN Treatment.²⁷⁴

Should South Africa be requested by an Affected Member, or elect to modify its GATS Schedule to make provision for the prohibition on ownership of agricultural land, the modification may be implemented in either horizontal or in a specific service sectors (for example, for the tourism specifically) to which the prohibition is most relevant.

The next Chapter will now look at why the RLHB's promulgation may violate South Africa's BITs.

²⁷¹ Ibid n153, P100.

²⁷² Article XXI (4).

²⁷³ Article XXI(4)(b).

²⁷⁴ Ibid note 273.

CHAPTER 3

Would the prohibition of FOAL violate any BIT obligations?

Apart from being a party to the GATS as a multilateral agreement, South Africa also concluded various Bilateral Investment Treaties with other countries worldwide, of which approximately 15 are currently still in force.²⁷⁵

According to the Department of Trade and Industry (the ‘DTI’), the reason why South Africa initially concluded many BITs was to ‘signal’ the country’s return to the international community after Apartheid.²⁷⁶ Furthermore, the aim was to give the assurance to foreign investors that their investments in South Africa would be secure in an attempt to encourage the inflow of FDI.²⁷⁷

Despite this apparent initial popularity, the Government has in recent years communicated openly about its changed policy framework on foreign investments mostly related to BITs for various reasons. These reasons mainly relate to the country’s priority of reforming its laws in achieving equality for its citizens. It has even been said, that the BITs concluded were inconsistent with the Constitution²⁷⁸ and that the threat of possible arbitration following a recent

²⁷⁵ Schedule of South African BITs, Available at:

<http://investmentpolicyhub.unctad.org/IIA/CountryBits/195#iaInnerMenu>, accessed on 21 November 2016.

²⁷⁶ Xavier Cariem, Deputy Director General: International Trade and Economic Development (ITED) DTI, ‘Update on the Review of Bilateral Investment Treaties in South Africa’, (15 February 2013), Page 2, available at: https://www.thedti.gov.za/parliament/2013/bit's_in_sa.pdf, accessed on 12 January 2017.

²⁷⁷ Ibid, n276.

²⁷⁸ Xavier Carim, ‘International Investment Agreements and Africa’s Structural Transformation: A Perspective from South Africa’ (2015), Investment Policy Brief, available at: https://www.southcentre.int/wp-content/uploads/2015/08/IPB4_IAs-and-Africa%e2%80%99s-Structural-Transformation-Perspective-from-South-Africa_EN.pdf, Page 4, accessed on 19 January 2017.

investment-state arbitration claim against South Africa, to be discussed below, prompted the move away from BITs.²⁷⁹

The latest investment policy framework adopted by the Government in 2010 aiming to ‘*strengthen*’ the country’s investment regime, confirmed the country’s aim to remain open to foreign investment and securing investments, while at the same time retaining sovereignty to regulate in the public interest.²⁸⁰ In this regard, the measures which the Government intended to put in place,²⁸¹ of which some have already been adopted include the: (i) promulgation of the Protection of Investments Act (‘**PIA**’)²⁸² which is to replace BITs in future;²⁸³ (ii) restricting the conclusion of BITs to only when there are ‘*compelling economic or political reasons*’; (iii) development of a BIT template with standard provisions to improve their interpretations;²⁸⁴ and (iv) review or termination of most BITs up for review.

The weaknesses identified by the DTI²⁸⁵ in respect of BITs mainly involve the nature of investor-state arbitration. These ‘*weaknesses*’ include the absence of a predictable precedent system; the confidentiality thereof; the wide interpretations of BIT protections and the possible imbalance between investors’ rights and state’s sovereign law-making powers.

By implementing the measures as set out above, like the PIA and trying to restrict the use of BITs, it seems that the Government is deeply aware of the potential liabilities it faces in the wake of implementing domestic laws affecting foreign investors. Nevertheless, whilst there are unquestionably essential grounds for why South Africa should be allowed to implement legislation like the RLHB, the rights of those who have invested in the country in good faith in the past will most probably not be ignored by arbitration tribunals at present or in future. While

²⁷⁹ Amy Farish, ‘Protection of Investments Act – A balancing Act between policies and investments’ , (2016), De Rebus, available at: <http://www.derebus.org.za/protection-investments-act-balancing-act-policies-investments/>, accessed on 19 January 2017.

²⁸⁰ Ibid n306, P29.

²⁸¹ Ibid n306, P30.

²⁸² 22 of 2015.

²⁸³ Azwimpheleli Langelanga, ‘Regulations for Foreign Investor Act Weighted Towards Dispute Settlement’, South African Institute of International Affairs (2017) Available at: <http://www.polity.org.za/article/regulations-for-foreign-investor-act-weighted-towards-dispute-settlement-2017-01-13>, accessed on 19 January 2017.

²⁸⁴ By preventing inconsistent, unpredictable and arbitrary interpretations.

²⁸⁵ Ibid n306, P26.

the author naturally fully appreciates the Government's policy goals potentially enshrined in the Bill, the Government should not lose sight of the ongoing non-appealable threat of international investor-state arbitration in the short to medium run before taking legislative steps such as the Bill.

This is because existing sunset clauses in BITs increase the life-span of most BITs, and because the PIA along with its draft Mediation Regulations²⁸⁶ do not apply to investments protected by existing BITs.²⁸⁷ The PIA, while aiming to, *inter alia*: protect investments subject to the Constitution; balance public interest against investor rights and obligations; and protect host state sovereignty - has been said to not providing sufficient comfort.²⁸⁸ This is because it does not: (i) provide for the typical BIT FET protections; (ii) deal with the scope of indirect expropriation; (iii) provide for investor-state arbitration as an option, but restricts arbitration to 'state-state' arbitration with Government's prior consent.

As a potential law which will be affecting the current and future rights and interests of foreign investors in agricultural land in South Africa, the RLHB must be considered in light of South Africa's existing BIT obligations and commitments. Ultimately, my aim is to determine whether or not by implementing the Bill, South Africa may possibly be found guilty of contravening the BIT protections it contractually agreed to provide under existing BITs. In doing this, the Chapter will deal with (i) how South Africa's BITs are protecting its foreign investors' rights to property; and (ii) what the possible impacts of the Bill will be on South Africa's BIT contractual relationships and on potential legal liability arising from claims flowing from such contractual relationships.

²⁸⁶ Published on 30 December 2016 for comments by 28 January 2017, in the Government Gazette No. 40526, Notice No. 958/2016, available at: http://www.gov.za/sites/www.gov.za/files/40526_gen958.pdf Page 53, accessed on 19 January 2017.

²⁸⁷ As confirmed per the Transitional Provisions in Section 15 of PIA.

²⁸⁸ *Ibid* n279.

3.1 South African BITS Include Typical Commitments and Protections

This section will show that by restricting existing and future FOAL in South Africa by way of the RLHB, the Government is likely to breach some of its commitments in terms of its operative BITS. What these commitments are and how they are likely to be affected in a BIT-relevant way depend on the existing rights of foreign owners in terms of these treaties. It will become apparent on a closer look at South Africa's BITS, that the BITS contain the usual host country commitments and investor protections with nuanced differences found in model BITS around the world.²⁸⁹ An analysis of these protections will reveal that they are familiar compared to those discussed under the GATS.

When considering the protections provided for by BITS in relation to the ownership of immovable property – one should note that there are two major rights which BITS do not protect, namely:

- (a) The right to own immovable property in a host state:** This is because it seems that most of the South African BITS contain the provision to the effect that '*[e]ach contracting party...shall admit such investments in accordance with its laws.*'²⁹⁰ It has been said, that this can be interpreted to imply that host countries only need to allow foreign investments in land, for example, to the extent that its domestic law allows it.²⁹¹ In relation to promulgation of the Bill this implies that upon it becoming law, no foreign investor can in future rely on BIT protections to claim the right to own land *per se* as this depends on what the domestic laws allow; and

²⁸⁹ Luke Eric Peterson, 'South Africa's Bilateral Investment Treaties. Implications for Development and Human Rights' *Dialogue on Globalisation*, (November 2006), p. 9 -10, available at: <http://library.fes.de/pdf-files/iez/global/04137-20080708.pdf>, accessed on 21 November 2016.

²⁹⁰ Article 2(1) of the Germany-South Africa BIT.

²⁹¹ *Ibid* n10, at P3.

- (b) **The right that immovable property will not be expropriated:** This is because the provisions of most South African BITs do not protect any foreign investor against expropriation *per se*. Investors in the host state and in the investor's country are only protected against expropriation if the conditions contained in most BITs were not complied with. These include for instance: public interest, due process, non-discrimination considerations as well as payment of '*prompt, adequate and effective compensation*.'²⁹²

The next section will commence with a discussion of the preliminary investigation into whether an investment falls within the ambit of a BIT for dispute resolution purposes. That will be followed by an analysis of some of the commitments and protections typically found in BITs, which could potentially be violated by South Africa when promulgating the RLHB.

3.1.1 Preliminary Investigations

The investigation of whether the prohibition of ownership of foreign agricultural land in South Africa, infringes any BIT protections will commence with the preliminary question of whether a particular investor and investment are covered by the provisions of a BIT.²⁹³ This is because BITs only protect those investors and investments as defined therein.²⁹⁴ How this is to be determined is by following the wording of most of South Africa's BITs.²⁹⁵ Before a foreign investor may rely on the protections covered by a BIT when complaining about a measure implemented by a host state – it has to determine the following:

- (i) Whether an investment and the complaining investor fall under the defined investments and investors in a particular BIT; and
- (ii) Whether the investment was in place during the relevant operational timeframe of the BIT.

²⁹² Article 4(1) Germany-South Africa BIT.

²⁹³ Campbell Mc Lachlan QC, Laurence Shore, Matthew Weiniger, *International Investment Arbitration Substantive Principles*, (2008), 1st Ed, P163.

²⁹⁴ Barton Legum, 'Defining Investment and Investor: Who Is Entitled to Claim?' (2005) Symposium Co-Organised by ICSID, OECD and UNCTAD - Making The Most of International Investment Agreements: A Common Agenda, available at: <http://www.oecd.org/investment/internationalinvestmentagreements/36370461.pdf>, Pages 1-6, accessed on 21 January 2017.

²⁹⁵ Campbell et al, *op cit* n293, P174.

A brief review of all South Africa's operative BITs shows that investment in immovable property is one of the defined means of investments to be protected in South African BITs. Foreign investments in South African immovable property, which include agricultural land, are therefore explicitly protected by this country's BITs.

Furthermore, and in relation to the second enquiry above, an investor will have to determine if at the time when an investment was made - a relevant BIT was in place in order to rely on it. It has been said that BITs usually do not require that an investment must have been made *after* a BIT came into force in order to be protected. This is because BITs generally provide that its scope extends to investments made before and after it came into force.²⁹⁶ Nonetheless, claims in terms of BITs may usually only be brought as provided for in the BIT and only after the BIT entered into force.²⁹⁷ In the event of it being terminated, an investor must show that a grace period is provided for in the BIT within which South Africa may be held accountable despite such termination.²⁹⁸ These grace periods are also known as '*sunset-clauses*' which mostly provide that the commitments and protections in BITs remain intact for periods of up to ten and twenty years after termination of a BIT.²⁹⁹ For example, the Germany-South Africa BIT which terminated on 22 October 2014 also provides for a typical sunset clause.³⁰⁰ Article 13(3) of this BIT provides that its provisions will stay effective after termination thereof in respect of investments made prior to the termination, for a period of twenty years.

3.1.2 The Protections Provided by South African BITS

Once it is settled that the protections contained in a BIT are applicable to investors during a dispute between a host state and investors, the affected investors will have recourse to certain

²⁹⁶ Ibid n293, P174.

²⁹⁷ Ibid n305, P103.

²⁹⁸ Agnieszka Zarowna, 'Termination of BITs and Sunset Clauses – What Can Investors in Poland Expect?' (2017) available at <http://kluwerarbitrationblog.com/category/sunset-clauses/>, accessed on 6 March 2017.

²⁹⁹ Ibid n298.

³⁰⁰ UNCTAD Investment Policy Hub website, available at: <http://investmentpolicyhub.unctad.org/IIA/country/195/treaty/1757>. Accessed on 12 January 2017.

dispute resolution forums as provided for in South Africa's BITs, for example: investor-state arbitration.³⁰¹

In order to do this, however, the applicable investors will have to show that any of the protections to which the South African Government committed *vis a vis* their investments in terms of a BIT, were infringed. These protections are what the rest of this section will deal with in order to demonstrate the kind of possible claims the Bill's promulgation may potentially prompt.

From a review of the preambles of all of South Africa's BITs currently in force, the ground rules on which the BIT standards are based are the promotion of, for example: stable and predictable investment environments, legitimate expectations, transparency, consistency and non-arbitrary conduct. Furthermore, BITs in general and equally for the BITs in place between South Africa and other states, set out to protect the investments in South Africa by the relevant contracting states' investors and *vice versa*.³⁰² The typical protections which South Africa as a host state and the other contracting states have agreed to in favour of investors include the following two most relevant ones for purposes of for this thesis:³⁰³

- (i) Expropriation of property will only be in the public interest, according to due process of law, and with compensation; and
- (ii) Investors requiring full physical and legal protection and security of their investments.

To determine accordingly whether the investors of South Africa's BIT partners will potentially have any rights of recourse in terms of a breach or violation of any of the BITs, one has to determine from the investor's point of view, the rights which may be infringed in terms of the protections as provided for by these treaties.

³⁰¹ R. Doak Bishop, James Crawford and W. Michael Reisman, *Foreign Investment Disputes, Cases, Materials and Commentary*, (2005), 1st Ed, Kluwer Law International, Page 10; Ibid n294, P5-6.

³⁰² Ibid n305, P103.

³⁰³ Luke Eric Peterson, 'South Africa's Bilateral Investment Treaties. Implications for Development and Human Rights' *Dialogue on Globalisation*, (November 2006), p. 9, available at: <http://library.fes.de/pdf-files/iez/global/04137-20080708.pdf>, accessed on 21 November 2016.

3.1.2.1 Expropriation in Public Interest, with Due Process and Compensation

Writers like Dolzer and Schreuer are of the view that the international law rules on expropriation of foreign property have been the ‘*central concern*’ predominantly for foreign investors for many years³⁰⁴ and another said expropriation is almost always complained of in investor-state arbitration.³⁰⁵ This brings us to the RLHB whereby our Government on the one hand aims to prohibit FOAL, and on the other, recognises the critical impacts of foreign direct investment on economic development and growth.³⁰⁶ With this in mind, the Bill will now be considered in the realm of expropriation to determine whether, directly or indirectly, it may lead to expropriation and essentially: if it will be in line with the conditions for expropriation as provided for in the BITs.

As seen above, the RLHB will not have a retrospective effect,³⁰⁷ which implies that there will be no direct expropriation of foreign-owned immovable property in South Africa when the Bill becomes law.³⁰⁸ Indeed, direct expropriation would probably lead to various compensation claims in the investor-state arbitration forum against the South African Government, but this seems not to be on the agenda in terms of the RLHB for now.³⁰⁹ Nevertheless, as seen above, it is also anticipated that the promulgation of the RLHB will entail the implementation land ceilings of up to 12 000 hectares and that land in excess hereof will be purchased by Government who indicated that this will involve compensation on a fair and equitable basis.³¹⁰

³⁰⁴ Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2008) 89.

³⁰⁵ Surya P Subedi, *International Investment Law Reconciling Policy and Principle*, (2008) 1st Ed, P120.

³⁰⁶ Xolelwa Mlumbi-Peter, ‘South Africa’s Trade and Investment Policy, a Presentation to the Parliamentary Portfolio Committee’, (2015) available at: https://www.thedti.gov.za/parliament/2015/SA_Trade_Investment_Policy.pdf, at P21, accessed on 12 January 2017.

³⁰⁷ See section 1.1 above.

³⁰⁸ Ibid n24.

³⁰⁹ South African Government News Agency, ‘New Legislation to come before Parliament’, (2016), available at: <http://www.sanews.gov.za/south-africa/new-legislations-come-parliament>, accessed on 13 January 2017.

³¹⁰ See section 1.1 above.

Moreover, it has been said that direct expropriation has become ‘*rare*’ in international investments because the authorised taking of foreign property title may lead to the damage of a country’s reputation³¹¹ if the expropriation was arbitrary and without proper compensation.

As seen above,³¹² of the main uncertainties concerning the promulgation of the RLHB in light of existing foreign owned agricultural land, is the for example, the possibility of existing foreign owners being restricted to disposing of their agricultural land to South Africans. This section will accordingly focus on the probability of foreign investors from South Africa’s BIT partner countries claiming that the RLHB leads to *indirect* expropriation of their existing property rights, which the author is of the view, may be the ancillary effect of the Bill.

It is important to note for now though that all of South Africa’s BITs currently in force and those terminated but containing sunset clauses, contain expropriation clauses. Of these, some expressly make provision for both direct and indirect expropriation, while others may be interpreted as such.³¹³

To illustrate this, some examples of the types of expropriation clauses found in South Africa’s BITs are as follows:

In the China-South Africa BIT:

‘Article 4

1. Investments of investors of either Contracting Party shall not be nationalised, expropriated, or subjected to measures having effects equivalent to nationalisation or expropriation (hereinafter referred to as “expropriation”) in the territory of the other Contracting Party except for public purposes, under domestic legal procedure, on a non-discriminatory basis and against compensation. ...

2.’ [Emphasis added.]

³¹¹ Ibid n304, P92.

³¹² See section 1.1 for the discussion on the practical implications of the RLHB on existing FOAL.

³¹³ Ibid n304, P93.

In the Sweden-South Africa BIT:

'Article 4 Expropriation and Compensation

(1) *Neither Contracting Party shall take any measures depriving, directly **or indirectly**, an investor of the other Contracting Party of an investment unless the following conditions are complied with:*

(a) *the measures are taken in the public interest and under due process of law;*

(b) *the measures are distinct and not discriminatory; and*

(c) *the measures are accompanied by provisions for the payment of prompt, adequate and effective compensation, which shall be transferable without delay in a freely convertible currency.*

(2) *.....*

(3) *.....* ' [Emphasis added.]

From these examples it is clear that expropriation in the context of South Africa's BITs typically are not only restricted to direct expropriation, and regardless of how the protection is worded, they mainly contain protection against indirect expropriation. It also seems that either the BITs refer explicitly to indirect expropriation/deprivation,³¹⁴ like in the case of the Sweden-South Africa BIT, or it refers to '*measures having effects equivalent to nationalisation or expropriation*' as seen in the China-South Africa BIT. There is also a general consensus that most BITs in existence contain similar wording.³¹⁵

Based on the wording of the example expropriation clauses contained in South African BITs as set out above, it can be argued that foreign BIT investors will have to claim that an investment has been indirectly expropriated and that therefore, all the conditions pertaining to expropriation should be complied with.³¹⁶ In its defence South Africa will, as is the case most

³¹⁴ It is the author's view, that the use of '*deprivation*' in this BIT should not be confused with the concept of deprivation in terms of Section 25(1) of the Constitution (which is not discussed). Deprivation in the Constitution is distinguished from expropriation because it is seen as a wider concept encompassing expropriation - as only some deprivations will constitute expropriation. [See Currie, I & De Waal, J, the Bill of Rights Handbook, (2013) 6th Edition, P541.] In the context of International Investment Law though, it has been said to be a synonym for expropriation. [See OECD Working Papers on International Investment 2004/04, "Indirect Expropriation" and the "Right to Regulate" In International Investment Law, (2004) available at: http://www.oecd.org/daf/inv/investment-policy/WP-2004_4.pdf, P3, accessed on 2 March 2017.]

³¹⁵ Dolzer & Schreuer op cit, n311, P93.

³¹⁶ United Nations Conference on Trade and Development, Expropriation, UNCTAD Series on Issues in International Investment Agreements II, (2012), available at: http://unctad.org/en/docs/unctaddiaicia2011d7_en.pdf, P12-27, accessed on 31 January 2017.

probably for other host states subject to expropriation provisions under their BITs,³¹⁷ then have to prove the fulfilment of the following conditions³¹⁸ which were extracted from South African BITs:

- a. That the expropriation was for public purposes and with regard of due process;
- b. It was done under domestic legal procedure, on a non-discriminatory basis; and
- c. It was against compensation.

In determining whether the introduction of the Bill comes down to indirect expropriation for which the above conditions must be met, the next section will deal with this concept, followed by the requirements or conditions.

a) Will the Bill Authorise Indirect Expropriation?

It is notable that South Africa's BITs do not clearly define what is meant by indirect expropriation or by measures having the effect equivalent to expropriation. My research also did not reveal an all-encompassing definition of what constitutes indirect expropriation, which appears to depend very much on the circumstances having the effect of possible indirect expropriation.

One wide definition found, however, refers to those measures that '*leave the investor's title untouched*' but at the same time takes away the ability of the investor to use its investment in a meaningful way.³¹⁹ An arbitral tribunal approached by an investor complaining of an indirect expropriation will therefore have to determine, based on the facts of the particular case,³²⁰ whether the measure reduces or takes away any of the property rights of the investor.

A closer look at the ways in which arbitral tribunals and courts internationally have interpreted the term indirect expropriation reveal a certain pattern although it seems to still be

³¹⁷ Ibid n311, P91.

³¹⁸ Ibid n316, P27.

³¹⁹ Ibid n311.

³²⁰ Ibid n311, P96.

debateable.³²¹ In this regard, UNCTAD suggested that indirect expropriation may be characterised by the existence of: ³²² (i) a governmental act; (ii) which interferes with property rights/interests; (iii) to the degree that the rights/interest lose *‘all or most of their value or the owner is deprived of control over the investment’*; and (iv) the owners preserves title or possession thereof (the **‘UNCTAD test’**).

An aggrieved BIT foreign investor in South Africa will therefore have to prove that the Bill has the effect of depriving the investor of a substantial part of its property rights in owned agricultural land.³²³ The kind of measures constituting indirect expropriation encompass a wide range of government actions such as regulations and acts.³²⁴ From interpretations of model BITs, it has been said that mostly those government measures that interfere with a *‘tangible or intangible property right or property interest in an investment’* may be open to expropriation.³²⁵ Property rights were defined by UNCTAD as those crucial rights *‘inherent in the property’* including the usage and disposal thereof.³²⁶ In this regard, others have also said that indirect expropriation includes: *‘prohibitions on sale...through measures...permanent of...duration’* and the *‘forced sale of property...at grossly substandard prices....’*³²⁷

As a result of the RLHB potentially restricting the use and disposal rights in foreign-owned agricultural land, it seems that its implementation may be challenged on the basis of it amounting to the indirect expropriation of such rights. It is clear, however, that as per the UNCTAD test, the degree of interference (for example on the value of property) in such property rights will determine if it will amount to indirect expropriation.

However, on the side of caution, it has been said that a clear distinction must be maintained between the (i) normal regulatory rights of governments which do not constitute indirect expropriation and (ii) indirect expropriation.³²⁸ The difference between these two concepts are vital as the Government should be allowed to make laws not constituting indirect expropriation

³²¹ Ibid n311, P93.

³²² Ibid n316, P12.

³²³ Please see section 19 above for the description of property rights.

³²⁴ Ibid n316, P15.

³²⁵ Ibid n316, P19.

³²⁶ Ibid n316, P20.

³²⁷ Ibid n305, P139.

³²⁸ Ibid n316, P78.

for which they need not pay compensation.³²⁹ If it is determined that the measure is not a normal regulatory measure aimed at the welfare of the people but rather directed and irregular, it will be considered indirect expropriation.³³⁰

In the case of *Piero Foresti, Laura de Carli and Others v The Republic of South Africa*,³³¹ for example, which has been a landmark case for South Africa,³³² the arbitral tribunal in an ICSID investor-state arbitration hearing had to decide if South Africa was guilty of unlawfully expropriating Italian investors' mineral rights under the Italy-South Africa and Luxembourg-South Africa BITs due to failing to pay compensation. The claim resulted from South Africa's promulgation of the Mineral and Petroleum Resources Development Act³³³ (the '**MPRDA**') which the claimants argued resulted in the indirect expropriation of their old order mineral rights. Unfortunately, this case was settled before the tribunal could consider the investor's claims fully, but from the claims and the South African's Government's response to the claims, it is telling what the Government's stance is on such claims.

The claimants raised various expropriation grievances³³⁴ against the MPRDA. The most relevant grievance for this thesis, however, relates to their claim that their shares in the operating companies were directly or indirectly expropriated by the Black Economic Empowerment ('**BEE**') equity divestiture requirements which came about as a result of the MPRDA and the Mining Charter read together.³³⁵ The aforementioned equity divestiture requirements relate to existing foreign investors having been required in terms of the Mining Charter to sell 26% of their shares in certain mining companies to historically disadvantaged South Africans (the '**HDSA indirect expropriation claim**'). The unlawfulness in this expropriation claim related to the failure by the Government to not pay compensation for the equity divestiture. To understand the Government's defences it is important to understand the background to the Government's case which actually relates to the said **BEE** provisions as contained in the MPRDA. The

³²⁹ Ibid n316, P86.

³³⁰ Ibid n316, P139-140.

³³¹ ICSID case no ARB(AF)/07/1, available at:

https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1651_En&caseId=C90.

³³² The policy aspects surrounding this case will be discussed toward the end of this Chapter. It seems that this case sparked the change in the country's investment of policy.

³³³ 28 of 2002.

³³⁴ Supra n331, paras 59 – 66, P16 - 17.

³³⁵ Ibid n334, P17.

promulgation of this Act had the effect of the Government taking hold of ownership of all natural resources in South Africa and allowing access to mineral rights only by way of licences. The effect was that previous owners of private mineral rights now had to apply for licences in order to continue with their mining processes on their properties. The Government denied the claim of expropriations, including the HDSA indirect expropriation claim for, *inter alia*, the following reasons:³³⁶

- (i) The MPRDA as a '*generally applicable and non-discriminatory regulation*', did not amount to expropriation because there was no prior promise of it not being adopted. This makes sense in light of what was discussed above at section 3.1 relating to governments not guaranteeing that expropriation will not take place which seems to be a sovereign right;³³⁷
- (ii) Indirect expropriation is only possible for a substantial deprivation of the investor's rights; and
- (iii) Expropriation cannot be involved where the measure is a way of achieving '*legitimate public regulatory purposes*' rationally and proportionally.

From the above, it is the author's view that the Government's main approach in respect of the claim of indirect expropriation was to deny the existence indirect expropriation and therefore, to deny the existence of the obligation to pay compensation. Without having sight of the Government's submissions to the arbitral tribunal, it is unclear what the basis for Government's defence was.

What is clear, however, is that investors, like in the *Piero Foresti* case, have previously embarked on challenging South Africa's BIT commitments on claims for large amounts of compensation, albeit not entirely successfully, based also on indirect expropriation.

This must entail the careful consideration of at least those practical implications possibly amounting to indirect expropriation, as discussed in Chapter 1.³³⁸ Moreover, the extent to which

³³⁶ Ibid n331, P19.

³³⁷ Ibid n316, P1.

³³⁸ See section 1.1.

foreign property rights are infringed by the Bill, according to tests like the UNCTAD test above will determine whether these claims constitute indirect expropriation or any form thereof.

b) Establishing the Lawfulness of Indirect Expropriation

In the possible event of indirect expropriation being established in the context of the RLHB, the Government will have to prove that the indirect expropriation, nonetheless, was lawful in terms of the customary law of expropriation.³³⁹ This means that the Government acted in line with the conditions for expropriation as set out at section 3.1.2.1 above.

As discussed, to be lawful, expropriation in general requires the following:

(i) To be for the public order and following due process:

- a. Criticism of the Bill has been that it is more about politics than restoring the wrongs of the past because of the relatively small percentage of foreign agricultural land ownership in the country.³⁴⁰ Whether this is in fact the truth will have to be shown by the Government if ever an investor complains that the Bill constitutes indirect expropriation because expropriation is required to be for '*legitimate welfare objectives*' and not for '*private gain*' or for illegal purposes.³⁴¹ Legitimate grounds have included health, safety and the environment but it has been said that most of South Africa's BITs do not include these grounds as guidelines for what constitutes public order.³⁴²
- b. What constitutes public order will depend on what governments decide is necessary for the welfare of its people and the same holds true for South Africa if faced with the enquiry as to why foreign agricultural land ownership is to be restricted.³⁴³ For this, South Africa will most probably refer to the policy and Constitutional grounds

³³⁹ Ibid note 316, Page 27.

³⁴⁰ The Economist, 'I had a farm in Africa South Africa takes a populist turn on land reform', (2015), available at: <http://www.economist.com/news/middle-east-and-africa/21645232-south-africa-takes-populist-turn-land-reform-i-had-farm-africa>, accessed on 21 November 2016.

³⁴¹ Ibid n316, P29.

³⁴² Ibid n289, P23.

³⁴³ Ibid n316, P31-32.

as set out in Chapter 1, and unless a tribunal is not convinced that this prohibition is unnecessary for land reform purposes or instituted arbitrary, a tribunal will probably accept that the Bill is for the wellbeing of the people.

- c. For the Bill to be in line with due process it implies that the indirect expropriation must be in compliance with national legislation or international practice and that review thereof is possible independently.³⁴⁴ In South Africa, this should be achieved as the introduction and proclamation of all laws have to follow proper procedure and any law in conflict with Constitutional values may be challenged.

(ii) To be without discrimination:

- a. This has been said to mean that the indirectly expropriating measure should not
 - (i) treat foreigners differently based on their nationality or on where an investment originates from and (ii)³⁴⁵ it may not discriminate between foreigners and nationals either.³⁴⁶
- b. In my view, the Bill probably will not discriminate based on the nationalities or origin of investments as it does not seem to differentiate between foreigners in the prohibition of ownership. As long as all foreigners are treated the same, this condition should be complied with.
- c. Nevertheless, indirectly expropriating the disposal rights of foreign owners of agricultural land, may be seen as discriminating between foreigners and South Africans. In the case of *Eureko v Poland*, for example, a tribunal found that the Polish government expropriated a foreign investor's right to acquire a majority shareholding in a privatised governmental insurance company. The aim was to retain majority Polish control and exclude foreigner control. The expropriation was found to be a '*blunt violation of the expectations*' of the foreign shareholders who already owned shares, and therefore discriminatory.

³⁴⁴ Ibid n316, P36.

³⁴⁵ Ibid n316, P34.

³⁴⁶ Ibid n316, P36.

(iii) To be with compensation:

- a. If the Bill is found to lead to indirect expropriation, South Africa will be liable to pay compensation to the affected foreign owners of agricultural land.
- b. BITs provide for compensation whenever indirect expropriation has been proven.³⁴⁷ Studies have shown, that South Africa's BITs in general have allowed more protection for foreign property owners than for South Africans in terms of the Constitution when it comes to compensation.³⁴⁸
- c. The way in which compensation will be calculated will depend on the wording of the BITs and this is provided for in South African BITs.

A birds-eye view of these conditions therefore seem to imply that the number one concern of the Government should be whether the prohibition of FOAL may constitute indirect expropriation of any existing property right before any of the conditions may be raised. To this end, the economic impact on FDI and the fact that the Bill constitutes a total ban on FOAL are vital considerations.

3.1.2.2 Full Protection and Security of Investments

In addition to the above, South African BITs all seem to contain this typical form of protection from its BIT partners in favour of investors.³⁴⁹ In the South African context this protection is detailed under the heading in its BITs entitled: '*Promotion and Protection of Investments*' and is contained in paragraphs that vary in length and detail. An example of one of the seemingly shortest and most prevalent of this type of protection found in the Finland-South Africa BIT is worded as follows:

³⁴⁷ Ibid.

³⁴⁸ Ibid n289, P22.

³⁴⁹ Klaeger, P118.

'Article 2 Promotion and Protection of Investments

(a) ...

(b) Investments by investors of one Contracting Party shall at all times be accorded fair and *equitable treatment and shall enjoy full protection and security in the territory of the host Party*. The host Party shall in no way in its territory, by *unreasonable or discriminatory measures*, impair the management, maintenance, *use, enjoyment or disposal of investments* by investors of the other Contracting Party.' [Emphasis added.]

The concept of full protection and security has been described as being of a general nature and encompassing the need of investors to be sheltered against physical violence and violations of their rights by operation of the laws of the host state.³⁵⁰

From the South African example above the writer is of the view that the literal interpretation can be made from Article 2(2) that both South Africa and Finland as host states are prohibited from doing the following in respect of foreign investments in each other's countries:

- (i) Impose unreasonable or discriminatory measures;
- (ii) Impair management, maintenance, use, enjoyment or disposal of investments by investors.

As seen above, the latter commitment of South Africa in this regard, may therefore be interpreted as protecting Finnish investments against measures which impair the disposal of investments. Although not the traditional view, case law developed the idea that states may breach their commitment under the commitment of '*Full Protection and Security*' by more than just physical means but also intangibly, through amendment of laws or by administrative actions.³⁵¹ This implies that the country's laws and administrative decisions should protect foreign investor's rights. An example of this type of protection has taken the form of laws which had the effect of an investor's contract party in the host state cancelling its contract with the foreign investor.³⁵² The tribunal in the *CME v Czech Republic* case found that host states have the obligation of ensuring that foreign investments are not 'withdrawn or devalued' by laws which

³⁵⁰ Dolzer & Schreuer, P151.

³⁵¹ Dolzer & Schreuer, P151.

³⁵² *CME v Czech Republic*, ICSID award, para.613.

are promulgated by the state's administrative bodies. Here, and in relation to the RLHB, the question is whether by its enactment, it will create a legal environment in which foreign investments will be unsafe through withdrawals and devaluations.

In the context of the Bill, the author makes the following observations regarding withdrawals:

- (i) What will the effect will the Bill have on those sale agreements possibly concluded in respect of South African immovable property at the time when the Act is promulgated? The author is of the view that this will probably not become an international law issue as presumably the South African Legislature will deal with this in terms of transitional provisions in the Act once the Bill is promulgated.
- (ii) However, in the event of a sale agreement having to be cancelled as a result of the introduction of the Bill, which for some or other reason does not fall under any transitional provision, investors might take issue with the Bill.
- (iii) Furthermore, should there be any other contractual agreements between local and foreign investors, which are dependent on the conclusion of sale agreements of immovable property, foreign investors may be aggrieved by the Bill.
- (iv) In the event the market values of foreign owned properties falling, foreign investors may be aggrieved. Whether the devaluation will lead to dispute resolution is, however, another question as this will probably depend on the materiality of the devaluation.

From the above accordingly, it does seem that the promulgation of the RLHB will, in the very least, lead to investors from its BIT partner countries carefully consider their existing property rights in respect of agricultural land in South Africa.

CONCLUSION

It is clear that foreign trade and investment have long been important priorities of the current South African Government. Not only is the country a participating WTO Member, it has recently introduced the PIA which should indicate to its investors that it has an alternative, though not perfect, plan to protect foreign investment despite terminating some BITs. This seems to reiterate what Nelson Mandela once said:

'We are firmly of the belief that the existence of the GATT, and now the World Trade Organization, as a rules-based system provides the foundation on which our deliberations can build in order to improve ... As we enter the new millennium, let us forge a partnership for development through trade and investment.'

While the restriction of land ownership (including of agricultural land) in the world is not a novelty, South Africa is nevertheless bound by the commitments and obligations which it has undertaken as both a WTO Member and a BIT contracting party. These commitments and protections aim to ensure that all international trading parties, like South Africa, abide by the same rules. In its decision to introduce the Bill as a potential new law, South Africa therefore is expected to consider the impact that it can have on, for example as discussed in this thesis, its international trading parties in services and all its existing BIT partners which include those who rely on sunset clauses.

Even if the implementation of the Bill may not constitute an MFN violation under the GATS, it cannot be excluded that South Africa's services trading parties utilising agricultural land in South Africa might feel aggrieved by South Africa now withdrawing future foreign ownership of such land. This is because some may be offended by the Bill treating South African services providers more favourably by allowing them such ownership rights despite extent restrictions. In addition, South Africa might be accused of not complying with its Market Access commitment as a result of restricting foreign capital participation in entities owning agricultural land. Whilst only time will tell if fellow WTO Members may complain of the Bill violating South Africa's Market Access and National Treatment commitments, the resource and possible

reputational losses due to such a complaint should not be underestimated as the RLHB will affect both existing and future FOAL. Although it is possible that South Africa could successfully raise the justification ground of the Bill being necessary to protect the public order – the question remains if the Government has considered all its alternatives. This is especially relevant as it has already been determined by academics that the targeting of foreign owned agricultural land might not sufficiently support the land reform goals of Government. Foreigners mostly purchase residential land, and the full extent of foreign ownership of land is unclear. If South Africa is determined to introduce the Bill, however, the author suggests that South Africa should modify its GATS Schedule to prevent possible legal claims from WTO Member countries regardless of its complexities.

Furthermore, despite South Africa terminating its BITs and the new protections under the PIA, it seems the latter Act does little in providing comfort to new investors, while existing investors may be aggrieved by the possible indirect expropriation effects of the Bill under its operative BITs. The history of investor-state arbitration worldwide in relation to indirect expropriation, of which South Africa has had a taste in the *Piero Foresti* case, shows that investors typically do not shy away from raising this type of claim if domestic laws limit the proprietary rights of investors.

While South Africa's sovereign right to implement domestic legislation to achieve equality amongst its people, is undoubtedly crucial to the future of the country, it is pivotal for South Africa to protect its foreign trading partners and investors. South Africa has invited them into the country and is still reliant on them for economic growth. Moreover, while allowing access to agricultural land to foreigners by way of long term leases might be a viable option to most foreigners utilising agricultural land, it might nevertheless limit the value of investments made by foreigners considerably.

It is the author's recommendation accordingly, that South Africa revisits this radical position *vis a vis* its foreign trading partners and investors. This does not mean that South Africa should not restrict foreign property ownership of agricultural land - but it should consider alternatives, such as: (i) improving the implementation of existing land reform policies and structures; (ii) significantly improving available statistics on foreign ownership to enable more

informed decision-making and responsiveness; and (iii) considering alternative property restrictions: like requiring that foreign owners only acquire agricultural land with prior permission of the Government.

The message that the prohibition of foreign ownership of agricultural land might send to the rest of the world is that South Africa is limiting its openness to foreign trade and investment. It therefore remains to be seen how South Africa will henceforth be perceived particularly given that South Africa is a neighbour to countries like Namibia and Zimbabwe which have similar restrictive approaches towards foreign ownership of land.

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